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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 134

BUSCH JEWELRY CO., A CORPORATION,
AND DR. F. M. DOOLEY,
Petitioners,

vs.

THE STATE BOARD OF OPTOMETRY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

BUSCH JEWELRY CO., A CORPORATION,
AND DR. F. M. DOOLEY,

Petitioners,

vs.

THE STATE BOARD OF OPTOMETRY,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under U.S.C.A. Title 28, Sec. 1257 (3), providing:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * "

and under Rule 38 (5) (a), providing:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Summary Statement of Matters Involved

Petitioners were unconstitutionally held by the Supreme Court of Mississippi to be engaged in the unlawful practice of Optometry, that the State Board of Optometry had statutory authority to maintain the suit, and that injunction should issue to restrain petitioners from further engaging in such unlawful practice.

A.

The Parties:

1. The State Board of Optometry, sole complainant in the Chancery Court of Hinds County, Mississippi, appellee in the Supreme Court of Mississippi and respondent here.

2. Dr. F. M. Dooley, a duly licensed and practicing physician, and Busch Jewelry Company, a Delaware Corporation, defendants in the Chancery Court of Hinds County, Mississippi, appellants in the Supreme Court of Mississippi and petitioners here.

B.

The Facts:

Dr. F. M. Dooley, the holder of a degree of M.D. from the University of Tennessee, was duly and legally licensed to practice as a physician and surgeon in the State of Mississippi, by the State Board of Health of Mississippi, said Board being prescribed by statute of the state (Section 7024, Code of 1942) and charged with the duty of examining

applicants and granting licenses to practice medicine by Section 8879, Code of 1942, reading as follows:

> "Every person who desires to obtain a license to practice medicine must apply therefor, in writing, to the state board of health at least ten days before the date of the examination and must be examined by said board touching his learning on the following branches of medicine, viz.: anatomy, chemistry, obstetrics, and gynaecology, materia medica and pharmacology, physiology, pathology, surgery, hygiene, physical diagnosis, histology and bacteriology, theory and practice of medicine, diseases of the eye, ear, nose and throat, and if the applicant be found by the board, upon examination, to possess sufficient learning in said branches and to be of good moral character, the board shall at once issue him a license to practice medicine, which shall be signed by all members of the board present at said meeting; provided that no applicant shall be granted a license unless said applicant shall hold a diploma from a reputable medical college that requires a four years' course of at least thirty-two weeks for each session.
>
> "However, it is further provided that said applicant may after completing two years of his medical course, apply to the board and obtain permission to take an examination on six of the prescribed subjects, which examination, if successfully passed, shall entitle such applicant to a credit on his final examination after finishing his four years' course and obviate the necessity of his taking a further examination of such subjects as a condition to his obtaining a license to practice medicine."

The board is also charged with the duty of regulating the practice and is given, by Sec. 8893, Code of 1942, the power to suspend or revoke the license of any physician upon the grounds set out in said code section, which reads as follows:

> "The Mississippi State Board of Health may on its own initiative or on complaint suspend or revoke for

any cause named below any license that it has issued that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or curing disease, injury, or other bodily condition; and said board is furthermore authorized and empowered to direct the cancellation in the office of the clerk of any circuit court of any record of any license so suspended or revoked.

(a) The causes for which a license may be suspended or revoked and the record of such license canceled are as follows:

(1) The habitual personal use of opium, of cocoa leaves, of cannabis, or of any preparation or derivative of any of them, hereinafter referred to as "narcotic drugs."

(2) Administering, dispensing, or prescribing any narcotic drug aforesaid otherwise than in the course of legitimate professional practice and for the prevention, alleviation, or cure of disease or for the relief of suffering, and not primarily for the purpose of catering to the cravings of an addict.

(3) Conviction of violation of any Federal or State law regulating the possession, distribution, or use of any narcotic drug aforesaid.

(4) The use of alcohol or of any beverage or liquor containing alcohol, or of any drug, in such manner as incapacitates the licentiate for professional practice.

(5) Procuring, or attemption to procure, or pretending to procure, or aiding or abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman.

(6) Conviction of a misdemeanor involving moral turpitude or of a felony.

(7) Fraud or deception in obtaining a license to practice.

(b) The State Board of Health, however, shall not suspend or revoke a license unless and until the board has caused written notice to be served on the licentiate to be proceeded against, hereinafter referred to as the

respondent, informing him of the charges against him and appointing a time, not less than ten days after the service of notice, and a place when and where he may appear in person or by attorney to defend himself against such charges. Such notice may be served on the respondent personally or by registered mail addressed to him, postpaid, at his last known address.

(c) The board may subpoena persons and papers on its own behalf and on behalf of the respondent, may administer oaths, and may compel the testimony of witnesses. It may issue commissions to take testimony, and testimony so taken and sworn to shall be admissible in evidence for and against the respondent. The board shall be entitled to the assistance of the chancery court or the chancellor in vacation, which, on petition by the board, shall issue ancillary subpoenas and petitions and may punish as for contempt of court in the event of noncompliance therewith. A hearing authorized by this section may be either public or private, as the State Board of Health deems to be in the public interest.

(d) The board may make public its orders and judgments in such manner and form as it deems proper. It shall in event of the suspension or revocation of a license direct the clerk of the circuit court of the county in which that license was recorded to cancel such record.

(e) Any person aggrieved by the action of the board may petition the circuit court for a writ of certiorari, and that court after a hearing may modify, affirm, or reverse the judgment of the board or may remand the case to the board for further proceedings. A petition for a writ of certiorari must be filed within twenty days, immediately following the service on the respondent of a copy of the order of judgment of the board, unless the court, for cause shown, extends the time. If the State Board of Health in due course appeals from any decree of the court, no bond shall be required of it in order to perfect its appeal.

(f) Every order and judgment of the board shall take effect immediately on its promulgation unless the board in such order or judgment fixes a different date.

It shall continue in effect, notwithstanding an appeal by the respondent, unless the court, on the issue of a writ of certiorari, by injunction, or other decree terminates it earlier.

(g) Unless the court otherwise decrees, a license that has been suspended by the board for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the board so orders, which it may do on its own motion or on the petition of the respondent. A license that has been revoked shall not be restored to validity except: (1) after a rehearing by the board on petition of the respondent, for good cause shown, filed within ten days, immediately following the service on him of the order or judgment of the board revoking his license or (2) by order of the court, on petition as aforesaid. Any licentiate whose license becomes again valid after a period of suspension or after it has been restored to validity after a rehearing or by an order of the court, shall record it again in the office of the clerk of the circuit court of the county in which he resides in conformity with the requirements of Section 5854 (Code of 1930; Sec. 8884, Code of 1942);

Nothing in this Act shall be construed as limiting or revoking the authority of any court or of any licensing or registering officer or board, other than the State Board of Health, to suspend, revoke, and reinstate licenses and to cancel registrations under the provisions of Section 16, Chapter 289, Laws of Mississippi, 1936, (Sec. 6859, herein)."

The State Board of Health is given the power to enjoin and prohibit any person from the practice of medicine, who has not been granted a license therefor by Sec. 8923-51, Code of 1942, which reads as follows:

1. "An action for any injunction may be brought and maintained in the name of any state board authorized to hold examinations and grant license to practice any

profession to enjoin and prohibit any person from the practice of any profession required to be licensed by said board, when such person is practicing said profession and has not been granted a license therefor.

2. "Said action for injunction shall be filed and heard either in the county in which the defendant resides or in which he practices the profession sought to be enjoined, and no bond shall be required, and no damages, fees or other costs shall be taxed against said board for the bringing of such suit. The court or judge shall not issue a temporary restraining order or injunction under this act, but shall hear and decide said matter on its merits either in term time or vacation as soon as possible. The provisions of this act shall not be construed to affect persons practicing chiropractic, drugless healing other than surgery, otheopathic or veterinary science.

3. "The authority conferred by this act is in addition to and supplementary to all other statutes, civil and criminal, dealing with the subject matter herein, and the institution and prosecution of any action shall not preclude the institution and prosecution under other appropriate civil or criminal statutes dealing therewith."

The practice of medicine is defined by Sec. 8888, Code of 1942, which reads:

"The practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person, any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity, or the practice of obstetries or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation; provided, that nothing in this section shall apply to females engaged solely in the practice of midwifery."

Dr. Dooley engaged in the general practice of medicine for many years and in 1937 (R.130) began to specialize in the examination of eyes, treating them for diseased condition, and correcting the vision with glasses (R.130).

In 1920, the Mississippi Legislature passed an act regulating the practice of optometry in the state, which act appears as Sections 8832-8846, inclusive, of the 1942 Code. This act created a State Board of Optometry, authorized the board to hold examinations of those applying for license to practice optometry, prescribed the qualifications of applicants, provided for the issuance of licenses by the board to those qualifying, and provided for the revocation of license for grounds stated in the statute. In addition, the act (Sec. 8846, Code of 1942) provided:

> "The provisions of this chapter shall not apply to physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery. And provided that this chapter shall not prohibit merchants and druggists who are actually engaged in business in this state from selling and assisting purchasers in fitting spectacles and eye glasses in their place of business at time of sale."

In addition, the act denied to optometrists the right to use drugs for the examination or treatment of the eye, Section 8845 of the 1942 Code providing:

> "Nothing in this chapter shall be construed as conferring on the holder of any certificate of licensure issued by said board the title of doctor, oculist, opthalmologist, or any other word or abbreviation indicating that he is engaged in the practice of medicine or surgery, or the treatment or the diagnosis of diseases of, or injuries to the human eye, or the right to use drugs or medicines in any forms for the treatment or examination of the human eye."

Dr. Dooley was practicing under a license duly issued to him by the State Board of Health that authorized him to engage in the practice of physician and surgeon, was using drugs in the treatment and examination of eyes, and, the Optometry Act not applying to him, he made no application for license to practice optometry and was granted none. He continued to practice under his license as physician and surgeon, continued to use drugs in examination and treatment of the eye, and has continued so to do since then.

In 1950, Dr. Dooley entered into a contract with Busch Jewelry Company, a Delaware Corporation, qualified to do business in Mississippi and owning and operating a jewelry store in Jackson, Mississippi, in connection with which it operates an optical department on the main floor of its store. By the terms of the contract, Dr. Dooley was employed at a monthly salary to examine and treat with drugs the eyes of customers desiring glasses, and to issue prescriptions for glasses, if needed. Dr. Dooley, at times, used drugs, when needed, in the examination of the eye, and if any examination disclosed any diseased condition of the eye, Dr. Dooley prescribed drugs for treatment (R.157) and, after the disease had been eliminated, prescribed glasses if found to be needed. The Busch Jewelry Company then ground the lenses according to the prescription, fitted the lenses into frames, selected by the customer, and delivered the glasses to the customer, collecting therefor either in cash or upon an easy payment plan in installments.

Before employment by Busch Jewelry Company, Dr. Dooley was employed by Bracken Jewelry Company, and has been engaging in the specialized practice as a physician, as aforesaid, in the State of Mississippi since 1937. His competency as a skilled physician has never been called in question and is not questioned in this suit. He has at all times since receiving his license to practice medicine re-

mained in good standing with the State Board of Health, as a practicing physician, and the State Board of Health has constantly recognized his right to engage in this work under his license as a physician.

On August 29, 1951, the State Board of Optometry brought this suit under the provisions of Sec. 8923-51, Code of 1942, herein above set out, to enjoin Dr. Dooley and Busch Jewelry Company from further engaging in their operations as aforesaid. Busch Jewelry Company answered and in paragraph 10 of its said answer (R.52) charged as follows:

> "The defendant charges that Dr. F. M. Dooley is a duly licensed and practicing physician and surgeon, practicing under the authority of license issued under the Laws of this State, for the practice of medicine or surgery, by the duly constituted authorities of this State, and that Dr. Dooley is in no way accountable to the State Board of Optometry nor may his conduct in the practice of his profession be called in question by the State Board of Optometry."

Dr. Dooley's answer adopted the answer of Busch Jewelry Company.

The Chancery Court of Hinds County, Mississippi granted the injunction as prayed for and its decree was affirmed on appeal by the Supreme Court of Mississippi on February 9, 1953.

In the assignment of errors filed in the Supreme Court of Mississippi (Pages 174-176 of record) the first ground of assigned error was as follows:

> "The Trial Court erred in holding that the State Board of Optometry has authority to maintain this suit."

The seventh ground assigned as error was:

> "The construction placed by the Trial Court on the optometry statutes of this state bring them into contradiction with and into violation of Section 14 of the Constitution of this state and Article 14 of the Amendments to the Constitution of the United States, and render them unconstitutional, and the Trial Court erred in placing upon the statute an unconstitutional interpretation when the statute is susceptible of a constitutional interpretation."

In the brief for appellant, filed in the Supreme Court of Mississippi (a certified copy of said brief is to be found among the original exhibits sent up by the Supreme Court of Mississippi), it was argued under Point Eight thereof that the State Board of Optometry has no power to bring or maintain the suit and the federal question of the violation of the Fourteenth Amendment was fully argued under Point Nine of said brief.

A suggestion of error was filed and it was overruled by the Supreme Court of Mississippi on March 23, 1953, this constituting final action by the highest court of the state.

It is contended by petitioners:

(1) Dr. Dooley was, at all times, lawfully engaged in the practice of medicine.

(2) Dr. Dooley's right to pursue the legitimate practice of medicine is guaranteed to him by the Fourteenth Amendment.

(3) The Fourteenth Amendment guarantees to Dr. Dooley the right to practice his profession free from regulation except by those duly authorized so to do by statute, enacted by the Legislature of the State, in the lawful exercise of the police power of the state.

(4) The State Board of Optometry has not been authorized by statute to bring this suit, and is an intermeddler.

Hence, the State of Mississippi is not a party and is not bound by the suit. The State Board of Optometry was not the owner or holder of the cause of action. Consequently, the court was without jurisdiction and its decree was void. The court assumed to act without authority of law to try the case. Only the State Board of Health has been authorized by statute to bring this suit.

(5) Effectively depriving Dr. Dooley of his right to practice his profession by the judicial action of a court having no jurisdiction is as much a violation of the Fourteenth Amendment as denial of such right by an unconstitutional law, and violates due process of law.

(6) Dr. Dooley has been effectively deprived of his right to practice his profession by a void judicial action in violation of the Fourteenth Amendment and this Court will review and set aside such unconstitutional judicial action, restore to Dr. Dooley his constitutional right and protect him in the exercise thereof.

Questions Whereas to Certiorari Is Herein Sought

The questions involved herein are of such importance as to demand certiorari. They are:

1. Did the State Board of Optometry have authority to bring and maintain this suit and if not, did the Court have jurisdiction of the case and if not, is the decree rendered therein not void?

2. If the Court has erroneously determined that it had jurisdiction, does not the decree rendered against petitioners deprive them of their property without due process of law?

3. If the decree deprives petitioners of their property, without due process of law, does this Court not have jurisdiction, and is it not its duty, to review and set aside the decree?

Reasons Why Certiorari Should Be Herein Granted

Certiorari should be granted herein because:

1. Dr. Dooley was, at all times, lawfully engaged in a specialized practice of medicine and was not, at any time, engaged in the practice of optometry.

2. Dr. Dooley's right to pursue the legitimate practice of medicine is guaranteed to him by the Fourteenth Amendment.

3. The Fourteenth Amendment guarantees to Dr. Dooley the right to lawfully practice his profession free from regulation, except as authorized by the State, in the lawful exercise of its police power.

4. The State, through its Legislature and in the exercise of its police power, has established such regulations as it has deemed necessary to protect the public health and safety, and, in cases involving physicians, has exclusively vested the enforcement of such regulations in the State Board of Health and such Board is the only agency authorized by statute to act for and in the name of the state in such enforcement of such regulations. The State Board of Optometry is wholly lacking in statutory authority to bring or maintain this suit, has no ownership in or possession of the right of action it seeks to enforce and is merely an intermeddler, wholly without right in the cause of action. There is no cause of action involved in the suit, the Court had no jurisdiction because thereof, and the decree is void.

5. The lack of power in the State Board of Optometry to bring and maintain this suit has been alleged in the pleadings, argued on the hearings and argued in the briefs, as being in violation of the Fourteenth Amendment, and therefore has been properly raised.

6. This void decree, effectively depriving Dr. Dooley of his property right to practice his profession, rendered by

the judicial action of a court having no jurisdiction, is as much a violation of the Fourteenth Amendment as a denial of such right by an unconstitutional law, and violates due process of law.

7. This court will review and set aside such judicial action, restore to Dr. Dooley his constitutional right and protect him in the exercise thereof.

8. The constitutional question involved herein is of public importance and the federal right asserted has been ruled upon and denied by the highest court of the state. *Titus* vs. *Wallick,* 59 S. Ct. 557, 306 U.S. 282, 83 L. Ed. 653.

9. The state court having no jurisdiction, its judgment is in violation of the Fourteenth Amendment and cannot be sustained independent of the federal question. The federal question is of such controlling character that its correct decision is necessary to any final judgment. *Murdock* vs. *Memphis,* 20 Wall 590, 22 L. Ed. 429.

10. The question involved is a federal question of substance and the state court has decided it "in a way probably not in accord with applicable decisions of this Court." (Rule 38 (5) (a).

11. Petitioners have exhausted all of their legal remedies in the courts of the state of Mississippi. Unless certiorari is granted, petitioners will be unable to have the unconstitutional judgment of the court stayed or rendered ineffective and said judgment will be effective to deprive petitioners of their property in violation of the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States.

Wherefore, petitioners pray that a Writ of Certiorari issue from this Honorable Court, directed to the Supreme Court of Mississippi, commanding that court to certify and send to this Court for its review and determination, on a day to be named therein, a full and complete transcript of record

of all of the proceedings in the case of Busch Jewelry Company and Dr. F. M. Dooley vs. The State Board of Optometry, No. 38,670 on the docket of that court, and that the judgment of said court may be reversed and appropriate rectification be here had.

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Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

BUSCH JEWELRY COMPANY, A CORPORATION,
AND DR. F. M. DOOLEY,
Petitioners,

vs.

THE STATE BOARD OF OPTOMETRY,
Respondent

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Chancery Court of Hinds County, Mississippi, rendered June 22, 1952 (R.163-4) is made Appendix "A" to this brief.

The opinion of the Supreme Court of Mississippi dated February 9, 1953 (R.177-182) is made Appendix "B".

No opinion was rendered by the Supreme Court of Mississippi on overruling the Suggestion of Error. (R.186). The order overruling same was rendered on March 23, 1953. (R.186).

Basis for Jurisdiction

The jurisdiction of this Court is invoked under U.S.C.A. Title 28, Sec. 1257(3) providing: "Final judgments or de-

crees, rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: " * * * (3) By writ of certiorari * * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * " and under Rule 38(5)(a) providing: "Where a State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

A Substantial Federal Constitutional Right Was Set Up and Claimed and Was Denied by the State Court

Busch Jewelry Company, in Paragraph 10 of its answer, charged:

> "The defendant charges that Dr. F. M. Dooley is a duly licensed and practicing physician and surgeon, practicing under the authority of license issued under the Laws of this State, for the practice of medicine or surgery, by the duly constituted authorities of this State, and that Dr. Dooley is in no way accountable to the State Board of Optometry nor may his conduct in the practice of his profession be called in question by the State Board of Optometry." (R.52).

Busch Jewelry Company, in paragraph 12 of its answer, charged:

> "Defendant denies that the complainant has any cause of action and denies that the complainant has any cause of action whatever upon anything complained of in the bill of complaint filed in this cause." (R.54).

Dr. F. M. Dooley adopted the answer of Busch Jewelery Company and each and every allegation therein. (R.42).

The federal constitutional right was argued by petitioners in the Chancery Court of Hinds County.

On appeal to the Supreme Court of Mississippi, the assignment of error contained the following:

> "Ground 1. The Trial Court erred in holding that the State Board of Optometry has authority to maintain this suit.
>
> "Ground 7. The construction placed by the Trial Court on the optometry statutes of this state bring them into contradiction with and into violation of Section 14 of the Constitution of this state and Article 14 of the Amendments to the Constitution of the United States, and render them unconstitutional, and the Trial Court erred in placing upon the statute an unconstitutional interpretation when the statute is susceptible of a constitutional interpretation." (R.174-175).

After the Supreme Court of Mississippi had affirmed the decree of the Chancery Court of Hinds County, proponents filed a suggestion of error, which, among others, suggested the following as grounds of error:

> "I. The Court erred in holding that Dr. F. M. Dooley was not engaged in the practice of medicine but was engaged in the practice of optometry.
>
> "IV. The Court erred in holding that the grant and issuance of the injunction in this case did not violate the constitutional rights of Busch Jewelry Company and of Dr. F. M. Dooley as guaranteed by Section 14 of the Constitution of 1890 and Article 14 of the Amendments to the Constitution of the United States." (R.184-185).

Hence it is clear that a right was "specially set up or claimed under the Constitution" as contemplated by U.S.C.A. Title 28, Sec. 1257(3).

The Federal Question is One of Substance and the State Court Has Decided It in a Way Probably Not in Accord With Applicable Decisions of this Court

The State Board of Optometry had no authority to bring or maintain this suit. The State of Mississippi had vested this power solely and exclusively in the State Board of Health. The State Board of Optometry had no ownership or possession of the cause of action it sought to enforce. It was an intermeddler without right or power in the matter. An action cannot be maintained where the right of action is not in the party suing, but in another and any judgment or decree rendered in such a proceeding is a nullity. *Haynes* vs. *Ezell,* 25 Miss. 242; *American Book Co.* vs. *Vandiver,* 178 So. 598, 181 Miss. 518; *Bowers* vs. *Bailey* (Iowa), 21 NW 2d. 773; *Baldwin* vs. *Powell,* 61 N. E. 2d 412, 294 N. Y. 130. Motion denied 62 N. E. 2d 393, 294 N. Y. 840; *Thompson* vs. *Peck,* 181 A. 597, 320 Pa. 27; *Gusman* vs. *Marrero,* 180 U.S. 81, 21 S.Ct. 293, 45 L.Ed. 436. Restatement of the Law "Judgments", Sec. 9(a), p. 51.

The decision of the Supreme Court of Mississippi in this case is not in accord with its previous decisions above cited and the decision of this court in *Gusman* vs. *Marrero, supra.*

The right claimed but denied is one of substance. An unconstitutional judicial action is just as violative of a person's constitutional right as a conviction and punishment under an unconstitutional law. *Ex Parte Converse,* 137 U. S. 624, 11 S. Ct. 191.

Statutes Involved

The statutes involved are here set out for the convenience of the Court:

> *Sec. 7024, Code of 1942*—"The state board of health shall consist of ten members as follows: Nine ap-

pointive members and one elected by the state board of health, who shall be known as the executive officer. Eight of the appointive members shall be regular qualified physicians of the state and members of the state medical association. They shall be nominated to the governor by the state medical association, three from each congressional district in the state, from which number the governor shall appoint one from each congressional district. The said appointments to be confirmed by the senate. One appointive member shall be a dentist of the state and a member of the state dental association. The state dental association shall nominate to the governor three dentists from the state at large, from which number the governor shall appoint one, the said appointment to be confirmed by the senate. The member of the dental profession so appointed to serve for a period of six years. Whenever any vacancy among the appointed members of the board shall occur, the governor shall fill the same by appointment upon a recommendation of the state medical or state dental association, respectively, at the next regular meeting, as hereinbefore set forth, to fill the said unexpired term. The terms of office of the appointed members shall be six years, three of which shall expire January 1, 1932, three January 1, 1934, and three January 1, 1936, and thereafter the appointment shall be made so that each member shall serve the full term of six years."

Sec. 8879, Code of 1942—"Every person who desires to obtain a license to practice medicine must apply therefor, in writing, to the state board of health at least ten days before the date of the examination and must be examined by said board touching his learning on the following branches of medicine, viz.: anatomy, chemistry, obstetrics and gynaecology, materia medica and pharmacology, physiology, pathology, surgery, hygiene, physical diagnosis, histology and bacteriology, theory and practice of medicine, diseases of the eye, ear, nose and throat, and if the applicant be found by the board, upon examination, to possess sufficient learning in said branches and to be of good moral character,

the board shall at once issue to him a license to practice medicine, which shall be signed by all members of the board present at said meeting; provided that no applicant shall be granted a license unless said applicant shall hold a diploma from a reputable medical college that requires a four years' course of at least thirty-two weeks for each session.

"However, it is further provided that said applicant may after completing two years of his medical course, apply to the board and obtain permission to take an examination on six of the prescribed subjects, which examination, if successfully passed, shall entitle such applicant to a credit on his final examination after finishing his four years' course and obviate the necessity of his taking a further examination of such subjects as a condition to his obtaining a license to practice medicine."

Sec. 8888, Code of 1942—"The practice of medicine shall mean to suggest, recommend, prescribe, or direct for use of any person, any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity, or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation; provided, that nothing in this section shall apply to females engaged solely in the practice of midwifery."

Sec. 8893, Code of 1942 — "The Mississippi State Board of Health may on on its own initiative or on complaint suspend or revoke for any cause named below any license that it has issued that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or curing disease, injury, or other bodily condition; and said board is furthermore authorized and empowered to direct the cancellation in the office of the clerk of any

circuit court of any record of any license so suspended or revoked.

(a) The causes for which a license may be suspended or revoked and the record of such license canceled are as follows:

(1) The habitual personal use of opium, of cocoa leaves, of cannabis, or of any preparation or derivative of any of them, hereinafter referred to as "narcotic drugs."
(2) Administering, dispensing, or prescribing any narcotic drug aforesaid otherwise than in the course of legitimate professional practice and for the prevention, alleviation, or cure of disease or for the relief of suffering, and not primarily for the purpose of catering to the cravings of an addict.
(3) Conviction of violation of any Federal or State law regulating the possession, distribution, or use of any narcotic drug aforesaid.
(4) The use of alcohol or of any beverage or liquor containing alcohol, or of any drug, in such manner as incapacitates the licentiate for professional practice.
(5) Procuring, or attempting to procure, or pretending to procure, or aiding or abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman.
(6) Conviction of a misdemeanor involving moral turpitude or of a felony.
(7) Fraud or deception in obtaining a license to practice.

(b) The State Board of Health, however, shall not suspend or revoke a license unless and until the board has caused written notice to be served on the licentiate to be proceeded against, hereinafter referred to as the respondent, informing him of the charges against him and appointing a time, not less than ten days after the service of notice, and a place when and where he may appear in person or by attorney to defend himself against such charges. Such notice may be served on the

respondent personally or by registered mail addressed to him, postpaid, at his last known address.

(c) The board may subpoena persons and papers on its own behalf and on behalf of the respondent, may administer oaths, and may compel the testimony of witnesses. It may issue commissions to take testimony, and testimony so taken and sworn to shall be admissible in evidence for and against the respondent. The board shall be entitled to the assistance of the chancery court or the chancellor in vacation, which, on petition by the board, shall issue ancillary subpoenas and petitions and may punish as for contempt of court in the event of noncompliance therewith. A hearing authorized by this section may be either public or private, as the State Board of Health deems to be in the public interest.

(d) The board may make public its orders and judgments in such manner and form as it deems proper. It shall in event of the suspension or revocation of a license direct the clerk of the circuit court of the county in which that license was recorded to cancel such record.

(e) Any person aggrieved by the action of the board may petition the circuit court for a writ of certiorari, and that court after a hearing may modify, affirm, or reverse the judgment of the board or may remand the case to the board for further proceedings. A petition for a writ of certiorari must be filed within twenty days, immediately following the service on the respondent of a copy of the order of judgment of the board, unless the court, for cause shown, extends the time. If the State Board of Health in due course appeals from any decree of the court, no bond shall be required of it in order to perfect its appeal.

(f) Every order and judgment of the board shall take effect immediately on its promulgation unless the board in such order or judgment fixes a different date. It shall continue in effect, notwithstanding an appeal by the respondent, unless the court, on the issue of a writ of certiorari, by injunction, or other decree terminates it earlier.

(g) Unless the court otherwise decrees, a license that

has been suspended by the board for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the board so orders, which it may do on its own motion or on the petition of the respondent. A license that has been revoked shall not be restored to validity except: (1) after a rehearing by the board on petition of the respondent, for good cause shown, filed within ten days, immediately following the service on him of the order or judgment of the board revoking his license or (2) by order of the court, on petition as aforesaid. Any licentiate whose license becomes again valid after a period of suspension, or after it has been restored to validity after a rehearing or by an order of the court, shall record it again in the office of the clerk of the circuit court of the county in which he resides in conformity with the requirements of Section 5854 (Code of 1930; Sec. 8884, Code of 1942);

Nothing in this Act shall be construed as limiting or revoking the authority of any court or of any licensing or registering officer or board, other than the State Board of Health, to suspend, revoke, and reinstate licenses and to cancel registrations under the provisions of Section 16, Chapter 289, Laws of Mississippi, 1936, (Sec. 6859, herein)."

Sec. 6859, Code of 1942—"On the conviction of any physician, dentist, veterinarian, manufacturer, wholesaler, or apothecary of a violation of any of the provisions of this Act, in any court of competent jurisdiction, the clerk of said court shall send a certified copy of the indictment, affidavit, information, and of the rules, verdict and sentence to the board or officer, by whom the convicted defendant has been licensed to practice his or her profession or to carry on his or her business, such board or officer may in its or his discretion suspend or revoke the license or registration of the convicted defendant to practice his or her profession or to carry on his or her business. On the application of any such convicted defendant whose license or registra-

tion has been suspended or revoked, upon proper showing and for good cause, said board or officer may reinstate such license or registration. Any court of competent jurisdiction in which such a defendant is convicted of a violation of any of the provisions of this Act shall have the power in its discretion to suspend or revoke the license or registration of the convicted defendant and may thereafter, upon proper showing and for good cause reinstate such license or registration; provided that no board or officer shall reinstate any such license or registration where the same shall have been suspended or revoked by a court of competent jurisdiction; and provided further, that no court shall reinstate any license of such a convicted defendant which has been revoked by the board or officer by whom the convicted defendant was licensed to practice his or her profession or to carry on his or her business except upon a proceeding brought in a court of competent jurisdiction for the purpose of setting aside or restraining such suspension or revocation of license. Provided further, that this section shall not apply wherever any board is already, under existing statutes, vested with authority to suspend or revoke license because of violation of any Federal law regulating the use or disposition of narcotics."

Sec. 8923-51, Code of 1942—"1. An action for any injunction may be brought and maintained in the name of any state board authorized to hold examinations and grant license to practice any profession to enjoin and prohibit any person from the practice of any profession required to be licensed by said board, when such person is practicing said profession and has not been granted a license therefor.

"2. Said action for injunction shall be filed and heard either in the county in which the defendant resides or in which he practices the profession sought to be enjoined, and no bond shall be required, and no damages, fees or other costs shall be taxed against said board for the bringing of such suit. The court or judge shall not issue a temporary restraining order or injunction un-

der this act, but shall hear and decide said matter on its merits either in term time or vacation as soon as possible. The provisions of this act shall not be construed to affect persons practicing chiropractic, drugless healing other than surgery, otheopathic or veterinary science.

"3. The authority conferred by this act is in addition to and supplementary to all other statutes, civil and criminal, dealing with the subject matter herein, and the institution and prosecution of any action shall not preclude the institution and prosecution under other appropriate civil or criminal statutes dealing therewith."

Sec. 8845, Code of 1942—"Nothing in this chapter shall be construed as conferring on the holder of any certificate of licensure issued by said board the title of doctor, oculist, opthalmologist, or any other word or abbreviation indicating that he is engaged in the practice of medicine or surgery, or the treatment or the diagnosis of diseases of, or injuries to the human eye, or the right to use drugs or medicines in any forms for the treatment or examination of the human eye."

Sec. 8846, Code of 1942 — "The provisions of this chapter shall not apply to physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery. And provided that this chapter shall not prohibit merchants and druggists who are actually engaged in business in this state from selling and assisting purchasers in fitting spectacles and eye glasses in their place of business at time of sale."

Statement of Material Facts

Dr. F. M. Dooley, the holder of a degree of M.D. from the University of Tennessee, was duly and legally licensed to practice as a physician and surgeon in the State of Mississippi, by the State Board of Health of Mississippi, said board being prescribed by statute of the state, Sec. 7024,

Code of 1942, *supra,* and charged with the duty of examining applicants and granting licenses to practice medicine by Sec. 8879, Code of 1942, *supra.* The board is also charged with the duty of regulating the practice and is given the power by Sec. 8893, Code of 1942, *supra,* to suspend or revoke the licenses of any physician upon the grounds set out in said code section.

The State Board of Health is given the power to enjoin and prohibit any person from the practice of medicine, who has not been granted a license therefor by Sec. 8923-51, Code of 1942, *supra.*

The practice of medicine is defined by Sec. 8888, Code of 1942, *supra.*

Dr. Dooley engaged in the general practice of medicine for many years and in 1937 (R.130) began to specialize in the examination of eyes, treating them for diseased condition and correcting the vision with glasses. (R.130).

In 1920, the Mississippi Legislature passed an act regulating practice of optometry in the state, which act appears as Sections 8832-8846, inclusive, of the 1942 Code. This act created a State Board of Optometry, authorized the Board to hold examinations of those applying for licenses to practice optometry, prescribed the qualifications of applicants, provided for the issuance of licenses by the Board to those qualifying, and provided for the revocation of licenses for grounds stated in the Statute. It was expressly provided by Sec. 8846, *supra,* that the provisions of the chapter should not apply to physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery.

Dr. Dooley was practicing under a license duly issued to him by the State Board of Health that authorized him to engage in the practice of physician and surgeon, and he was using drugs in the treatment and examination of the eyes

and the optometry act not applying to him, he made no application for licenses to practice optometry, and was granted none. He continued to practice medicine under his licenses as a physician and surgeon, continued to use drugs in the examination and treatment of the eye and has continued to do so since then.

It was expressly provided by Sec. 8845, Code of 1942, supra, that nothing in the chapter on optometry should be construed as conferring on the holder of any certificate of licensure issued by the State Board of Optometry the right to use the title of Doctor, Oculist, Opthalmologist, or any other word or abbreviation indicating that he was engaged in the practice of medicine or surgery or treatment or the diagnosis of diseases of the eye or the right to use drugs or medicines in any form for the treatment or examination of the human eye.

In 1950, Dr. Dooley entered into a contract with Busch Jewelry Company, a Delaware Corporation, qualified to do business in Mississippi and owning and operating a jewelry store in Jackson, Mississippi, in connection with which it operates an optical department on the main floor of its store. By the terms of the contract, Dr. Dooley was employed at a monthly salary to examine and treat with drugs the eyes of customers desiring glasses, and to issue prescriptions for glasses, if needed. Dr. Dooley at times used drugs, when needed, in making the examination of the eye, and whenever an examination of the eye disclosed any diseased condition of the eye, Dr. Dooley first prescribed drugs for treatment (R.157) and after the disease had been eliminated, he prescribed glasses, if found to be needed. The Busch Jewelry Company then ground the lenses according to the prescription, fitted the lenses into the frames selected by the customer, and delivered the glasses to the customer,

collecting therefor either in cash or upon an easy payment plan in installments.

Before employment by Busch Jewelry Company, Dr. Dooley was employed by Bracken Jewelry Company and has been engaged in the specialized practice as a physician, as aforesaid, in the State of Mississippi since 1937. His competency as a skilled physician and oculist has never been called in question and is not questioned in this suit. He has, at all times since receiving his license to practice medicine, remained in good standing with the State Board of Health and the State Board of Health has constantly recognized his right to engage in this work under his license as a physician.

On August 29, 1951, the State Board of Optometry brought this suit under the provisions of Sec. 8923-51, Code of 1942, *supra,* to enjoin Dr. Dooley and Busch Jewelry Company from further engaging in their operations as aforesaid. Busch Jewelry Company answered and in Paragraph 10 of its said answer, charged that Dr. Dooley is a licensed and practicing physician and surgeon, practicing under the authority of a license issued under the laws of this state for the practice of medicine or surgery, by the duly constituted authorities of this state, and that Dr. Dooley is in no way accountable to the State Board of Optometry, nor may his conduct in the practice of his profession be called in question by the State Board of Optometry.

Under Paragraph 12 of their answer, Busch Jewelry Company charged that the defendant denied that the complainant has any cause of action whatever upon anything complained of in the bill of complaint filed in the cause.

The Chancery Court of Hinds County, Mississippi, granted the injunction as prayed for and its decree was affirmed on appeal by the Supreme Court of Mississippi on February 9, 1953. In the assignment of errors filed in the Supreme Court of Mississippi (R.174-176), the first ground of as-

signed error was as follows: "The Trial Court erred in holding that the State Board of Optometry has authority to maintain this suit."

The seventh ground assigned as error therein was: "The construction placed by the Trial Court on the optometry statutes of this state bring them into contradiction with and into violation of Section 14 of the Constitution of this State and Article 14 of the Amendments to the Constitution of the United States, and render them unconstitutional, and the Trial Court erred in placing upon the statute an unconstitutional interpretation when the statute is suspectible of a constitutional interpretation."

In the brief of appellant filed in the Supreme Court of Mississippi (a certified copy of said brief is to be found among the original exhibits set up by the Supreme Court of Mississippi), it was argued under Point 8 thereof that the State Board of Optometry has no power to bring or maintain the suit and the Federal question of the violation of the Fourteenth Amendment was fully argued under Point 9 of said brief.

The Supreme Court of Mississippi affirmed the decree of the lower court, as aforesaid, and a suggestion of error was filed and this was overruled by the Supreme Court of Mississippi on March 23, 1953, thus constituting the final action by the highest court of the state.

It is contended by petitioners:

(1) Dr. Dooley was at all times lawfully engaged in the practice of medicine.

(2) Dr. Dooley's right to pursue the legitimate practice of medicine is guaranteed to him by the Fourteenth Amendment.

(3) The Fourteenth Amendment guarantees Dr. Dooley the right to practice his profession free from regulation except by those duly authorized so to do by statute enacted by

the Legislature of the state in the lawful exercise of the police power of the state.

(4) Only the State Board of Health has been authorized by statute to bring this suit. The State Board of Optometry has not been authorized by statute to bring this suit and is an intermeddler. Hence, the State of Mississippi is not a party to this suit and is not bound by this suit. The State Board of Optometry was not the owner or holder of the cause of action. Consequently, the Court was without jurisdiction and its decree was void, the Court assuming to act without authority of law to try the case.

(5) Effectively depriving Dr. Dooley his right to practice his profession by the judicial action of a court having no jurisdiction is as much a violation of the Fourteenth Amendment as a denial of such right by an unconstitutional law and violates due process of law.

(6) Dr. Dooley has been effectively deprived of his right to practice his profession by a void judicial action in violation of the Fourteenth Amendment and this court will review and set aside such unconstitutional judicial action, restore to Dr. Dooley his constitutional right and protect him in the exercise thereof.

ARGUMENT

POINT I

Did the State Board of Optometry Have Authority to Bring and Maintain This Suit and, If Not, Did the Court Have Jurisdiction of the Case, and, If Not, Is the Decree Herein Rendered Not Void?

(A) *Dr. Dooley was engaged in the Practice of Medicine.*

It is undisputed in the record that Dr. Dooley was graduated from the High School at Oxford, Mississippi, and then attended the University of Mississippi for three and one-

half years, working toward a B.D. degree. He then entered Hospital Medical School, now the University of Tennessee, to pursue his studies of medicine and was graduated therefrom with a degree of M.D. in the class of 1890. He did his intern work in the Charity Hospital, Memphis, Tennessee (R.127) and then entered the practice of medicine in this state. For approximately sixty years he has followed the practice of his profession. In 1936 or 1937, he began to specialize as an oculist and treating the eyes where a diseased condition was found.

We now look to the undisputed evidence and we quote all of the pertinent testimony in regard to the nature of his practice—whether optometry or medicine:

> "Q. By what right are you prescribing glasses in your present employment?"
> "A. By the right of being a M.D."
> "Q. By the right of being a medical doctor?"
> "A. Yes, sir."
> "Q. Now, then, are you practicing optometry or are you practicing medicine?" (R. 143).
> "A. I think I am practicing medicine." (R. 143).
> "Q. Dr. Dooley, when you were testifying the other day, I asked you a question and then my attention was diverted to another matter and I didn't develop it as I intended to. In the practice of your profession, do you have any occasion to use drugs in the prescribing of eyeglasses?"
> "A. Yes, sir, rather infrequently I have to use some drugs."
> "Q. About how frequently would you say that would occur?"
> "A. Well, I never kept any record. I believe I had two last week. I haven't had any this week. Two or three or four a month, I reckon."
> "Q. Dr. Dooley, do you have occasion to use drugs to expand the pupil of the eye?"
> "A. Yes, on occasions it is very wise to do that."

"Q. In the practice of your profession, then, you do use drugs and prescribe for conditions of the eye and use drugs in the treatment of the eye in your examination?"

"A. O, yes. Yes, sir." (R. 157-158).

Was Dr. Dooley practicing medicine in the three or four cases a month where he used drugs in the examination and treatment of the eyes of the patient? Sec. 8845, Code of 1942, prohibits optometrists from using drugs in their practice. Sec. 8842 expressly provides that the prescribing of drugs shall constitute the practice of medicine. In Sec. 8845, Code of 1942, the Legislature unmistakably says: "Nothing in this chapter shall be construed as conferring on the holder of any certificate of licensure (as optometrist) issued by said board * * * the right to use drugs or medicines in any forms for the treatment or examination of the human eye."

But this is not all. Section 8888, Code of 1942, provides: "The practice of medicine shall mean to suggest, recommend, prescribe or direct for the use of any person, any drug, medicine * * * for the cure or palliation of any ailment or disease of mind or body * * * ".

Now, can any Court, with reason, hold that in prescribing and using drugs in the examination and treatment of the eye, Dr. Dooley was not practicing medicine (though the statute says he was) but was practicing optometry (which the statute plainly says he wasn't)?

The statutes cannot, in reason and justice, be construed to provide that Dr. Dooley, in using drugs for the examination and treatment of the eye, was not practicing medicine but was practicing optometry. To so hold is to entirely disregard the statutes and, in effect, to repeal them.

Now, it is undisputed in the evidence that when Dr. Dooley examined a patient, he would in three or four cases a month find and diagnose diseased conditions in the eye re-

quiring the use of drugs in examination or in treatment. In the other cases, his examination and diagnosis would disclose eyes free of disease. If he had not examined these patients and, in each case, diagnosed the diseased or non-diseased condition, it necessarily follows that he would not have discovered the diseased condition or prescribed the use of drugs. But he found three or four cases per month and two during the week before the trial in the lower court. How did he find these cases? He found them by examination and diagnosis of each patient who came to him. The only reasonable inference that can be drawn from the evidence in this case is that Dr. Dooley, as a physician, examined the eyes of each patient who came to him and diagnosed not only the defect, if any, in the vision of the patient, but also diagnosed the condition of the eye with reference to the presence or absence of a diseased condition therein. It is inescapable that in each instance there was an examination and diagnosis by him as a physician. In some cases, the existence of disease in the eye was diagnosed and drugs were prescribed. In the others, the condition of the eye was diagnosed as free of disease and only glasses, if needed, were prescribed. But in each and every instance, there was a diagnosis of the presence or absence, in the eye, of a diseased condition, and this in his capacity as a physician practicing medicine under a license issued to him as an M.D. by the State.

The diagnosis of the presence or absence of disease in the human body, without treatment, leaving the treatment thereof to some other physician or surgeon, has grown to be a well established branch of the practice of medicine. This is a matter of common knowledge. It requires no discussion or argument to demonstrate that the physician who thus applies his learning and energies is performing a highly important duty of the profession and is engaged in

the practice thereof, although he prescribes no drug and administers no specific treatment, even where a diseased condition is found. The diagnostician is well established everywhere in the field of medicine. That his acts constitute the practice of medicine is equally well established.

70 C.J.S., Sec. 10(b), p. 834, 835, states the rule as follows:

> *"While a person without a license or certificate undoubtedly violates the statutes when he not only diagnoses, but also prescribes, recommends, furnishes or applies a remedy, he may also violate the statutes by diagnosing without prescribing any drug or administering any treatment* * * *".

In *State* vs. *Rolph,* 140 Minn. 190, 194; 167 N. W. 553, the Supreme Court of Minnesota said:

> "The Science of diagnosing human diseases and human ailments has come to be a distinct branch or department of the medical profession; the diagnostician limiting his efforts to a discovery of the disease or ailment from which a patient may be suffering, its character and location, leaving the treatment thereof to some other physician or surgeon. This is a matter of common knowledge. And it requires no discussion or argument to demonstrate that the physician who thus applies his learning and energies is performing a highly important duty of the profession, and is engaged in the practice thereof, though he prescribes no drug and administers no specific treatment."

See also *People* vs. *Jordan,* 172 Col. 391, 156 Pac. 451 (discussing the point in passing on the validity of a statute); *Bailey* vs. *Niebruegge,* 211 Ill. A. 82 (diagnosing in the state and administering treatment in another state); *State* vs. *Howard,* 245 N. W. 871, 216 Iowa 545; *Ex parte Halsted,* 182 S. W. 2d 479, 147 Tex. Cr. 453.

The Supreme Court of Mississippi has recognized that

diagnosis of the presence or absence of disease in the human body constitutes the practice of medicine. In *Redmond* vs. *State*, 152 Miss. 54, 118 So. 360, this Court said:

> *"Taking the situation as a whole and considering it altogether, we are satisfied that the description of symptoms and the telling the proposed customer that a certain number of the medicine was good for his disease, or would cure or palliate it, constitutes a practice of medicine within the statute."*

Section 8845, Code of 1942, in its material portions reads:

> "Nothing in this chapter shall be construed as conferring on the holder of any certificate of licensure issued by said board, the title of doctor, oculist, opthalmologist or any other word or abbreviation indicating that he is engaged in the practice of medicine or surgery, *or the treatment or the diagnosis* of diseases * * * the human eye or the right to use drugs or medicines in any forms for the treatment or examination of the human eye."

The statute last quoted expressly prohibits the optometrist from diagnosing or treating diseases of the human eye. Here Dr. Dooley was examining patients daily and diagnosing the presence or absence of disease from the human eye—doing this as a physician under his license as an M.D., issued him by the State of Mississippi. Under the Statute, no optometrist was authorized to so do. He was doing it as an M.D., duly licensed, and had a right to do it as an M.D. No optometrist could lawfully examine and diagnose.

It is inescapable, from the evidence in this case, that Dr. Dooley, a graduate and duly licensed M.D., was practicing medicine in (1) the physical examination of the eye, (2) in the diagnosis of the presence or absence of disease in the eye, (3) diagnosing the nature of that diseased condition,

(4) prescribing drugs for the treatment thereof, and (5) fitting glasses for the correction of vision.

Dr. Dooley examined and diagnosed the condition of the eyes of 100 to 150 patients a month. (R.134). It was this examination that led to the diagnosing of a diseased condition of the eye in some four or five cases per month, (R.157), and a diagnosis of no diseased condition in the eyes of the remainder.

When a physician examines the applicant for a life insurance policy and finds no diseased condition, signing as M.D. his report finding the applicant an insurable risk, he is unquestionably acting in his capacity as a physician and is engaged in the practice of medicine.

When Dr. Dooley, a graduate M.D., and duly licensed physician, whose qualifications as a skilled physician are nowhere questioned in either the pleadings or the evidence, examined the eyes of a patient in his capacity as a duly licensed physician and diagnosed a diseased condition in the eye and used drugs in the treatment thereof, he was unquestionably practicing medicine. When later, after correction of the diseased condition, he, in his capacity as a duly licensed M.D. prescribed glasses for the correction of a defect or defects in vision, he was doing no more than prescribing an "appliance or other agency" "for the cure, relief or palliation of" "bodily" "deformity", as prescribed in Sec. 8888, Code of 1942, as constituting the practice of medicine.

It will be noted that under Sec. 8888, the prescribing of an "appliance or other agency", "for the cure, relief or palliation of" "bodily * * * deformity" constitutes the practice of medicine.

Sec. 8832, Code of 1942, defines optometry as follows:

> "The practice of optometry is defined to be the application of optical principles through technical meth-

> ods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers and adapting optical accessories for the aid thereof."

Consequently, the defect in vision that may be corrected by glasses is due to a departure of the eyeball from the normal—hence, a deformity in the shape of the eyeball or a departure from its normal shape.

The word "deformity" used in Sec. 8888, on what constitutes the practice of medicine, is defined in Twentieth Century Dictionary, unabridged, as "any unnatural state of the shape or form." Hence, the departure of the shape of the eyeball from the normal is a "deformity" and the prescribing of an "appliance, or other agency * * * for the cure, relief or palliation" of any "bodily * * * deformity" would include the prescribing of glasses to correct defective vision and come within the express terms of Sec. 8888 and the act of prescribing glasses for the correction of such defect constitutes the practice of medicine.

The general rule is stated in *41 Am. Jur.*, Sec. 28, p. 158, as follows:

> "Thus, in the absence of a statute specifically exempting the practice of optometry, such practice has been held to be within the meaning of a statute defining the practice of medicine."

In *Baker* v. *State*, 91 Tex. Crim. Rep. 521, 240 S. W. 924, the Court said:

> "Recalling the solicitude which the lawmaking department of the government of this state has displayed for the protection of the public health, the breadth of the language chosen in which to define the practice of medicine, and its failure to exempt the optometrist therefrom, bearing in mind the often repeated declaration of this court in construing the Medical Practice

Act, that it dealt not with the remedial agent employed, but embraced those treating any disorder or physical deformity for pay, we cannot persuade ourselves that those practicing optometry, as described by the evidence, are not embraced within the terms of the Medical Practice Act. The opposite interpretation of the statute would affirm that the legislature left unprotected so important, so delicate, so complicated a part of the body as the organ of vision, against the ills that might befall from the absence of restriction upon those who hold themselves out to the public as possessing the requisite knowledge and skill to determine and classify the ailments and consequent defects for a fee, and advise the corrective agencies which he determines are indicated.

"The legislature of this state, cognizant of the fact that in most of the other states of the Union, laws have been enacted with special reference to the protection of the vision against the consequences of ignorance upon the part of those who assume to detect the causes of impairment and correct errors of vision, has failed, as is done elsewhere, to separate those who thus practice into a distinct class, and prescribe the qualifications which shall entitle them to practice. We must, therefore, assume that, in requiring an examination and certificate from all who shall 'treat any disorder or physical deformity by any system or method, and charge therefor', it was not intended to exclude those who deal with the organ of vision, as did the appellant. The power of the legislature to put the optometrist in a separate class, as it has done dentists and nurses, is without question. The expediency of doing so is a matter of policy with which the courts are not concerned. Until it is done, or the optometrist, as defined in the evidence herein, is expressly exempted from the operation of the Medical Practice Act, he, in our judgment, is required thereby to obtain from the state a license showing that he possesses the knowledge requisite to the pursuit of the practice of medicine."

From the foregoing authority it cannot be successfully contradicted that originally the examination of eyes and the prescribing of glasses to correct the departure of the eye from the normal was originally a part of the practice of medicine, and in the absence of a statute specifically exempting the practice of optometry from the statutes regulating the practice of medicine, the practice of optometry constitutes the practice of medicine.

The examining of the eye and the fitting of glasses to correct defects in vision is generally held by the cases to constitute the practice of medicine. *41 Am. Jur., Sec. 28, p. 158.*

Until the optometrist was put in a separate class by our Optometry Statutes, one fitting glasses came within our statutes on the practice of medicine. *Baker* vs. *State,* 91 Tex. Crim. Rep. 521, 240 S.W. 924. The Optometry Statute does not amend or repeal our Sec. 8888 defining the practice of medicine and it is still in full force and effect.

In prescribing such glasses, Dr. Dooley was acting as a duly licensed physician and his act in so doing constituted the practice of medicine.

The Legislature of Mississippi intended that Dr. Dooley's such act would constitute the practice of medicine and remain so, despite the enactment of the laws on optometry.

Under *Sec. 8846, Code of 1942,* it was expressly provided:

> *"The provisions of this chapter shall not apply to physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery."*

The intent of the Legislature is clear. They intended, by Section 8846, to make it clear and did make it clear that physicians would continue to practice as before the passage of the optometry laws, free from all of its provisions and fully exempted therefrom. What was defined as the prac-

tice of optometry by Section 8832 was a part of the practice of medicine until its passage. It thereafter remained a part of the practice of medicine and is still a part of the practice of medicine except only to the extent that a licensed optometrist may fit eyeglasses under the Optometry Statutes just as a physician may fit them and under the statutes on physicians. The laws on physicians have no application to optometrists and the laws on optometrists have no application to physicians. The two professions practice concurrently in this field. If an optometrist fits glasses, he is practicing optometry. If a physician fits glasses, he is practicing medicine. If a party fits glasses without a license to practice either medicine or optometry, he may be proceeded against by either the State Board of Optometry or the State Board of Health. But the State Board of Health cannot question the acts of an optometrist and the State Board of Optometry cannot question the actions of a duly licensed physician. He is responsible only to the State Board of Health.

(B) *The State Board of Optometry is a Statutory Body and has Only Such Powers as Granted by Statute, Either Expressly or By Necessary Implication, and if the Complainant Has No Power to Sue, the Judgment Rendered Thereon is a Nullity*

The State Board of Optometry is a statutory board created by statute, and all of its powers and its duties are prescribed by the statute. It has no authority to do anything in the absence of a statute conferring such power, either expressly or by necessary implication.

In *Craig* v. *Stone et al,* 11 So. 2d 433, the State Tax Collector brought suit against A. H. Stone, State Tax Commissioner, in mandamus, to compel the State Tax Commissioner to assess privilege taxes for 1936 to 1940 inclusive on the pipeline of the Southern Natural Gas Company. The Trial

Court held that the Tax Collector had no authority to maintain the suit. The Supreme Court in passing upon the question held:

> "The trial court held that the Tax Collector had no authority to maintain the suit. We have reached the same conclusion upon the following considerations:
> "(1) The State Tax Collector must find his powers in the statutes; he has none other."

In *Mississippi Live Stock Sanitary Board* v. *Williams,* 133 Miss. 98, 97 So. 523, the defendants filed a plea of abatement denying the statutory authority of the Live Stock Sanitary Board to maintain the suit. The Lower Court sustained the plea and abated the suit. On appeal, the Supreme Court said:

> "It is familiar learning that public bodies or subdivisions of the state, or agencies of the state, have only such powers as are conferred on them by law, and, unless the statutes give the power to sue and be sued, such boards or bodies have not the power to sue or be sued. *Brabham* v. *Hinds County,* 54 Miss. 363, 28 Am. Rep. 352; *Anderson* v. *State,* 23 Miss. 459; *Freeman* v. *Lee County,* 66 Miss. 1, 5 So. 516, 15 *Corpus Juris,* 663 *et seq.*"

In *Gully, Tax Collector,* v. *Stewart,* 178 Miss. 758, 174 So. 559, the State Tax Collector filed a bill in the Chancery Court against the appellees to recover for the State the sum of $400,000.00, the value of sand and gravel alleged to have been wrongfully removed by them from the bed of Bayou Bernard, a navigable body of water in Harrison County, Mississippi. The Chancellor dismissed the bill on demurrer. The Supreme Court, in affirming the case on appeal, said:

> "At the threshold we are met with the question as to the power of the state tax collector to bring and prosecute this suit. His powers to sue are contained in Sec.

6986, Code of 1930, which follows: 'The state tax collector may appoint a sufficient number of deputies, but not to exceed ten at any one time. He shall have power and it shall be his duty to proceed by suit in the proper court against all persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, whether of the state, county, municipality, drainage, levee or other taxing district, or any subdivision thereof, and for all past due obligations and indebtedness of any character due and owing to them or any of them, except penalties for the violation of the anti-trust laws and except income and inheritance taxes. In all cases of valuation or ownership of property which has escaped taxation, he may have subpoenaed witnesses to testify before any board of supervisors, board of mayor and aldermen, or tax commission.'

"The tax collector is without authority to sue for an unliquidated demand growing out of tort."

In *State ex rel Rice* v. *Stewart et al,* 184 Miss. 202, 184 So. 44, there was a plea of res judicata setting up that a suit brought by the State Tax Collector was res judicata and estopped the State from again asserting the rights therein adjudicated. The Supreme Court of Mississippi in passing on this contention and particularly regarding the right of the State Tax Collector to bring the suit said:

"Considering first the plea of res judicata it will be found that in the case of *Gully, State Tax Collector* v. *Stewart,* 178 Miss. 758, 174 So. 559, the court held, without qualification, and without deciding any other question, that (page 560): 'The tax collector is without authority to sue for an unliquidated demand growing out of tort.' And, since the State, as a party litigant, is subject to all the rules governing the procedure of the courts in other cases, and entitled to all the rights and remedies to which individuals are entitled in a given state of case, as provided for under Section 6002 of the

Mississippi Code of 1930, the state could not be bound by an appearance in court on its behalf by an unauthorized official to any greater extent than an individual could be bound by the act of a person assuming to sue on his behalf without authority. A judgment resting on his unauthorized appearance in any other case is a nullity in so far as the rights of the State are concerned."

In *State* v. *Rogers,* 206 Miss. 643, 39 So. 2d 533, the decision of the Supreme Court of Mississippi cannot be regarded as being of too much authority for the reason that the writer of this brief wrote the opinion of the Supreme Court in that case; however, the opinion was concurred in by the other judges and hence we cite it as authority here and particularly the language contained in that opinion to the following effect:

"It is the well established law of this state that the State Tax Collector has only such powers and authority as are conferred upon that officer by statute, and his authority to institute and maintain these suits must be found in Section 6986, Code of 1930, which now appears as Section 9179, Code of 1942, which fixes and defines the powers and duties of the office. *Miller, State Tax Collector* v. *Coahoma County,* 157 Miss. 404, 128 So. 348; *State* v. *Adler,* 68 Miss. 487, 9 So. 645; *Bailey, State Tax Collector,* v. *Emmich Bros.,* Miss., 37 So. 2d 797, not yet reported in State reports; *Craig, State Tax Collector,* v. *Stone,* 194 Miss. 767, 11 So. 2d 433; *State* v. *Taylor,* 68 Miss. 730, 9 So. 894; *State* v. *Thibodeaux,* 69 Miss. 92, 10 So. 58; *Dunn Construction Co.* v. *Craig,* 191 Miss. 682, 2 So. 2d 166, 3 So. 2d 834."

It is clear from the foregoing that The State Board of Optometry is a statutory body and has only such powers as are granted by the statutes, either expressly or by necessary implication, and there being no provision in the statute authorizing this suit to be maintained by The State Board of

Optometry, then the said board has no such power and the decree rendered in such suit is a nullity.

(C) *The State Board of Optometry Had No Interest In or Ownership of the Cause of Action It Sought to Assert and Hence Had No Power to Invoke the Jurisdiction of the Court and the Abortive Judicial Action is a Nullity.*

As we have heretofore pointed out, Dr. Dooley is practicing as a physician under a license duly issued him by the State Board of Health. The optometry laws expressly provide that the chapter on optometry shall have no application to physicians practicing under such a license. The optometry board consists of five non-medical men or women. The Legislature has provided in the optometry laws for the examination of applicants upon their qualifications, the issuance of a license to practice optometry, and has provided the standard for the revocation of such license, but all of these provisions are contained in the optometry laws, and these same optometry laws expressly provide that they shall not apply to physicians and surgeons practicing under licenses issued to them to practice as physicians and surgeons.

It is inescapable, therefore, that The State Board of Optometry had no power to require Dr. Dooley as a duly licensed physician to stand any examination upon his qualifications to examine and treat eyes and prescribe eyeglasses. Neither did the State Board of Optometry have any power to require Dr. Dooley to have a license to practice optometry before he was authorized under the law to examine and treat eyes and prescribe eyeglasses. Neither does The State Board of Optometry have any statutory power to revoke Dr. Dooley's license as a practicing physician that had been issued to him by the State Board of Health. All of the powers to call his qualifications or his license into question have

been by the legislature vested in the State Board of Health. The State Board of Health, throughout Dr. Dooley's 53 years of practice has not seen fit to question his qualifications or to undertake to cancel or revoke his license. The State Board of Optometry is assuming to act in a capacity that the Legislature did not intend for it to assume. Neither did the Legislature authorize it to assume the powers it is undertaking to exercise in this lawsuit.

Looking now to the provisions of Section 8923-51, under which this suit has been brought, we find that a State Board may maintain an action for injunction in the name of said board to enjoin any person who is practicing a profession without license which the law requires that he first procure from that particular board before beginning the practice thereof. It does not authorize any state board to enjoin anyone lawfully practicing under a license lawfully issued by another state board pursuant to law. The statute says, *"an action for any injunction may be brought and maintained in the name of any state board authorized to hold examinations and grant licenses to practice any profession to enjoin and prohibit any person from the practice of any profession required to be licensed by said board." Ch. 431, Laws of 1946.*

The language of the statute is quite clear. Before a board has authority to maintain an injunction suit, three statutory prerequisites must co-exist, viz: (1) The complaining board must be the particular board authorized to license the practice of the profession, the practice of which it is seeking to enjoin; (2) the offender must be practicing that profession, *without the license,* which the law requires that he shall first obtain from that particular board before beginning the practice; and (3) the board can only maintain an injunction to enjoin the practice of a profession that it is authorized by law to license.

Here, all three of the statutory prerequisites are lacking.

The first prerequisite is lacking because Dr. Dooley was practicing medicine. The State Board of Optometry has no authority to grant licenses to practice medicine. It is inescapable, therefore, that the complainant, the State Board of Optometry, is not the board authorized by law to grant a license to practice medicine and has no statutory authority to maintain a suit to enjoin one engaged in the practice of medicine.

The second statutory prerequisite to the right to maintain a suit is also lacking. The statutory authority is: "An action for an injunction may be brought and maintained in the name of any state board * * * to enjoin and prohibit any person from the practice of *any profession required to be licensed by said board.*" *(Sec. 8923-51, Code of 1942).* Dr. Dooley was not required by law to be licensed by the State Board of Optometry. The law expressly provided that he should *not* be required to obtain a license from said board. The Optometry Act creating the State Board of Optometry, prescribing its powers to grant and revoke licenses to practice optometry, expressly provides in Sec. 8846, Code of 1942: "The provisions of this chapter (optometry) shall not apply to physicians or surgeons practicing under authority of licenses issued under the laws of the state for the practice of medicine or surgery * * * ". Hence, Dr. Dooley, practicing medicine under a license duly issued to him by the State Board of Health, was not "required to be licensed by said board", the State Board of Optometry, and by the express language of Sec. 8923-51, Code of 1942, the state board being authorized to enjoin the practice of optometry, without license, where license is required by law to be obtained from it, clearly has no application to Dr. Dooley, who was not required to obtain a license from said board.

The third statutory prerequisite to the maintaining of this suit under the authority of Sec. 8923-51, viz: the board

can only maintain an injunction suit to enjoin the practice of a profession that it is authorized by law to license, is also clearly lacking. Dr. Dooley was practicing medicine. He had a lawful license issued to him by the State Board of Health. The State Board of Health recognized his skill and competency and recognized his right to practice as a physician in this chosen specialized field. The optometrists, however, conspiring to create a monopoly for themselves in this field, undertook to maintain this unauthorized suit through the unauthorized State Board of Optometry. The State Board of Optometry has been granted no authority by the state to license the practice of medicine and Sec. 8923-51 grants that board no authority to maintain injunction suits save in cases where a party is practicing optometry without a license, *and is required by law* to obtain such license from the State Board of Optometry. Dr. Dooley had the lawful right to practice as a physician and the law did not require him to have a license from the State Board of Optometry. Section 8923-51 does not vest in the State Board of Optometry the statutory authority to maintain this suit. It is an intermeddler. The cause of action, if any, is vested in the State Board of Health. The suit is by a party having no interest in the subject matter.

Injunctive relief will not be granted to one who does not have some interest in the subject matter of the suit and the party seeking the injunction must stand on his own right or title rather than on the weakness of the right or title claimed by his opponent. 3 C. J. S., Sec. 53, P. 509; *Gilchrist Fordney Co.* vs. *Thigpen,* 114 Miss. 182, 74 So. 823.

(D) *The State Board of Optometry Having No Statutory Authority To Maintain This Suit, Its Bill of Complaint Did Not Invoke The Jurisdiction of the Court, the Court Was Without Jurisdiction and Its Purported Judgment is Void.*

It is elementary law that the cause of action sought to be enforced must actually exist and be fully owned and controlled by the complainant at the time the bill of complaint is filed, for it is certainly an indisputable and invariable rule of law that a right of action must be complete in complainant when an action therefor is commenced. *State* vs. *Rogers,* 206 Miss. 644, 659, 39 So. 2d, 533; *Railway* vs. *Baird,* 76 Miss. 523. 24 So. 195; *Robson* vs. *Benton Co.,* 15 Miss. 736; *Green* vs. *Hankinson,* 1 Miss. 487; *Lyon* vs. *Sanders,* 23 Miss. 535; *Brooks* vs. *Kelly,* 63 Miss. 616.

Jurisdiction cannot be conferred at the will of the parties nor even by the consent of all of them. *Welch* vs. *Bryant,* 157 Miss. 559, 565; 128 So. 734; *Brown* vs. *Bank,* 31 Miss. 459; *Hurd* vs. *Tombes,* 8 Miss. 233.

The entire and manifest want of jurisdiction may be raised at any time by any party to the cause (*Green* vs. *Creighton,* 18 Miss. 159) or by the court itself. *Bibb* vs. *Martin,* 22 Miss. 92; *Brown* vs. *Bank,* 31 Miss. 92; *Waits* vs. *Black Bayou Drainage District,* 186 Miss. 270, 185 So. 577; *Pease & Dwyer Co.* vs. *Somers Planting Co.,* 130 Miss. 147, 93 So. 673.

If the court does not have jurisdiction, as here, the purported judgment of the court is void even after being rendered and entered of record.

In *Pease & Dwyer Co.* vs. *Somers Planting Co.,* 130 Miss. 147, 93 So. 673, the Supreme Court of Mississippi said:

> "But it is argued in behalf of appellee that this question cannot now be raised, because appellant answered

appellee's bill, instead of testing the legal sufficiency thereof by demurrer; that, having failed to demur, appellant is estopped to assert that the appellee's bill stated no cause of action against appellant. If the defect in the bill complained of were a mere formal defect, the principle contended for would be sound. It is not a mere formal defect, however. The bill simply states no cause of action whatever in favor of appellee against appellant. On the contrary, by express averment, it is shown in the bill that the alleged warranty of soundness of the hay relied on by the appellee was a warranty addressed alone to the said J. E. Somers & Co., the purchaser of the hay from appellant, and that appellee was simply a subpurchaser from the said J. E. Somers & Co., without any right to the benefit of such warranty. Where a bill in equity states no cause of action against the defendant, the latter may take advantage of it on appeal, whether the question is raised in the court below or not. This may be done even where a decree pro confesso is taken against the defendant, or where the defendant expressly admits in his answer the truth of the allegations of the bill. Where the bill states no cause of action, a final decree on such bill amounts to nothing. It is void. *George* v. *Soloman,* 71 Miss. 168, 14 So. 531; *Garland* v. *Hull,* 13 Smedes & M. 76, 51 Am. Dec. 140; *Belew* v. *Jones,* 56 Miss. 342."

In Re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 S.Ct. 323, this Honorable Court said:

"We are unable to agree with the learned counsel, but are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and

written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void."

In *Haynes* vs. *Ezell,* 25 Miss. 242, the Supreme Court of Mississippi held:

"The case presents the curious anomaly of a suit in the name of the payee of a note, against subsequent holders, for the purpose of making them liable upon a contract of guaranty made to another and a different person. The declaration shows on its face, that Ezell has no right or title, by virtue of which he could maintain this suit. It is true he is the payee of the note, and did not indorse it; and in a suit against the maker, the holder of it would have had to use his name to recover. But this is not a suit on the note or against the maker, but against two parties who were at one time holders of it, and is brought upon a subsequent contract of guaranty made by them, not to or with Ezell, but to and with Walker. Although the statute of jeofails is very broad, we cannot extend it to a case, where the declaration shows on its face, that the right of action is not in the party suing, but in another."

In *American Book Co.* vs. *Vandiver,* 178 So. 598, 181 Miss. 518, the Supreme Court of Mississippi reaffirmed this doctrine in the following language:

> "A party plaintiff in any action for legal relief must show in himself a present, existent actionable title or interest, and this right must be complete at the time of the institution of the action; an inchoate right is not sufficient. Such is the general rule; and in mandamus particularly the right not only must be complete, but must be clear. 38 C.J. pp. 582, 583, and the numerous cases cited under note 71. Id. p. 585, note 78."

In *Gussman* vs. *Marrero,* 180 U.S. 81, 21 S.Ct. 293, 45 L. Ed. 436, this Court said:

> "The contention of appellee is that this is not an application for habeas corpus nor for writ of mandamus, but is an ordinary action. The appellant not only concedes the fact, but takes pains to assert it. It follows necessarily that he has no cause of action. However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this. The judgment of the Circuit Court must therefore be affirmed. Even if we regard the proceeding as one in habeas corpus, the same result would follow."

In *Restatement of the Law—"Judgments"*—Sec. 9a, p. 51, it is said:

> "If the court erroneously determines that it has jurisdiction over the defendant, he has ground for reversal in an appellate court, and ground for carrying the case to the Supreme Court of the United States since a judgment rendered against him by a court having no jurisdiction over him deprives him of property without due

process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."

In *Baldwin* vs. *Powell*, 61 N.E. 2d 412, 294 N.Y. 130, the Supreme Court of New York said:

> "When a statute creates a liability and prescribes the person who shall have the right to enforce it, the latter is as component a part of the statutory right of action as is the former."

POINT TWO

The Court having erroneously determined that it had jurisdiction, its judgment deprives petitioners of their property without due process of law.

(A) *The Right to Lawfully Practice One's Chosen Profession Is a Property Right Protected by Article 14 of the Amendments to the Constitution of the United States.*

Every person has the right to pursue any lawful business or vocation he may select and such right cannot be taken from him without due process of law. *16 C.J.S., Sec. 669, P.1421.*

The right to follow learned professions as law and medicine is property within the constitutional provision as to due process of law. *People* v. *Love*, 131 N.E. 809, 298 Ill. 304, 16 A.L.R. 703.

Dr. Dooley has a property right in the practice of his profession subject only to such reasonable regulations as may be provided by the State in the exercise of its police power. The legislature has exercised its police power by enacting Chapter 10 of the 1942 Code, being Sections 8878-8893, inclusive. Under the terms of Chapter 10 on physicians, Dr. Dooley has applied for and received a license from the State Board of Health to practice as a physician.

The State Board of Health is given the power of administering Chapter 10 of the Code of 1942, and is given the power to suspend or revoke licenses under the standards set up by Section 8893 of the Mississippi Code.

Since the State Board of Health is the State Board authorized to hold examinations and grant licenses to practice medicine in this State, Section 8923-51 gives to the State Board of Health, and only to the State Board of Health, the power to maintain a suit for an injunction to enjoin a person from the practice of the profession of medicine. It gives no other state board any power to maintain such an action.

In *Sinquefield* v. *Valentine,* 159 Miss. 144, 132 So. 81, 76 A. L. R. 238, the Supreme Court of Mississippi said that a citizen may not be deprived, without due process of law, of the right to contract, engage in common occupations and acquire a useful knowledge, and cited as its authority therefor *Meyer* v. *Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446. The Supreme Court of Mississippi, in its opinion, said:

> "In *Meyer* v. *Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, the court held that the liberty guaranteed by the Fourteenth Amendment to the Federal Constitution denotes not merely freedom from bodily restraint, but also the rights of the individual to contract, engage in any of the common occupations of life, and to acquire useful knowledge, to establish a home, to bring up his children, to worship God according to the dictates of his conscience, and to enjoy those privileges long recognized at common law as essential to man's happiness."

In *16 C. J. S.,* p. 1141, Sec. 567, the rule in general is stated as follows:

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under

such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

In *Brown* v. *Board of Levee Commissioners,* 50 Miss. 468, the Supreme Court of Mississippi said:

"These terms, 'law of the land', 'due course of law', 'due process of law', do not mean the general body of law, 'common and statute', as it was at the time the constitution took effect. For that would seem to deny to the legislature the power to alter, change or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies.

"The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.

"It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. *If any of these are disregarded,* in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due course of law.' "

(B) *The Court by its Unconstitutional Action has Deprived Dr. Dooley of his Property, Right to Practice his Profession, without Due Process of Law.*

The general rule is stated in *Restatement of the Law, "Judgments",* Sec. 9(a), p. 51, as follows:

"If the court erroneously determines that it has jurisdiction over the defendant, he has ground for reversal in an appellate court, and ground for carrying the case to the Supreme Court of the United States since a judgment rendered against him by a court having no jurisdiction over him deprives him of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."

In *Ex Parte Converse,* 137 U. S. 624, 11 S. Ct. 191, this Court said:

> "An unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law";

and later in the opinion:

> "If it assumes to act in a case over which the law does not give it authority the proceedings and judgment will be altogether void and rights of property cannot be divested by means of them."

In *12 C. J.,* p. 1195, Sec. 961, the rule is stated as follows:

> "The guaranties of due process of law extend to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative or executive, and relate especially to that class of rights the protection of which is peculiarly within the province of the judicial branch of the government. The want of due process of law may arise either from the fact that the law attempted to be enforced is void *or that the forms of law have not been observed.*

In *Home Telephone etc. Co.* v. *Los Angeles,* 33 S. Ct. 312, 227 U. S. 278, 57 L. Ed. 510, the Supreme Court of the United States held that where the unauthorized acts of state officers claiming to act under a state statute invade rights protected by the Fourteenth Amendment of the Federal Constitution, such unauthorized exercise of power by state officers constitutes an invasion of the rights guaranteed by the Fourteenth Amendment and the one whose rights have been so invaded may seek relief in the Federal Court and the Federal judicial power has jurisdiction to redress the wrong done by such state officers in misusing the authority with which they are clothed.

It is the contention of the appellants that Sec. 8923-51 authorizes on the State Board of Health to bring an action to enjoin the practice of the profession of physician in this state and that the State Board of Optometry is in this action without authority of law, assuming the powers that have been placed by the statute upon the State Board of Health, and that the acts of the State Board of Optometry in bringing this suit are unauthorized acts of the state officers claiming to act under a state statute. We submit that Busch Jewelry Company and Dr. Dooley have the right to insist that their conduct be called in question only by those having authority in law to call it in question, and this right is one that is guaranteed by the Fourteenth Amendment to the Federal Constitution. We also submit that the unauthorized exercise of power by the State Board of Optometry to bring this suit constitutes an invasion of the rights guaranteed by the Fourteenth Amendment to Busch Jewelry Company and Dr. Dooley.

To construe Section 8923-51 to authorize the State Board of Optometry to bring this suit would be to bring Section 8923-51 into direct conflict with the provisions of Section 14 of the Constitution of 1890 and of Article 14 of the Amendments to the Constitution of the United States.

In addition, it is undisputed in this case that Dr. Dooley is a competent physician, qualified in every way to examine and treat eyes and to prescribe glasses to correct the abnormalities of vision. There has been no evidence in this case to show any real or threatened danger to the safety of the public by a continuation of the practice of his profession.

The Supreme Court of the United States has held in the case of *Liggett Co.* v. *Baldridge,* 279 U. S. 105, 49 S. Ct. 57, that in order for the legislature to be justified in regulating the conduct of the business of an individual, such power to regulate must arise under the police powers of the state,

and unless there is a real and an apparent connection between the remedy prescribed and the evil sought to be corrected, then there cannot be said to be any reasonable exercise of the state police power and consequently the statute is void and unconstitutional.

The evil sought to be corrected by the legislature in the optometry statutes was to protect individuals from practice by charlatans and quacks and to prevent the treatment of eyes by anyone except those qualified so to do. The extent of the police power does not run beyond the protection of the public health, safety or welfare. Nothing has been shown in this record, either on the part of Busch Jewelry Company or on the part of Dr. Dooley, that would constitute any hazard to the public health and, consequently, any construction of the statute that would take away from Dr. Dooley and Busch Jewelry Company their property rights involved in this case would be an unreasonable exercise of the police power not justified by any real or apparent connection with the public health, welfare or safety.

POINT THREE

The judgment complained of deprives petitioners of their property without due process of law, and this court has jurisdiction to review and set aside the decree

(A) *The Constitutional Right Here Claimed Was Specially Set Up or Claimed Under the Constitution.*

Busch Jewelry Company, in Paragraph 10 of its answer, charged:

> "The defendant charges that Dr. F. M. Dooley is a duly licensed and practicing physician and surgeon, practicing under the authority of license issued under the Laws of this State, for the practice of medicine or surgery, by the duly constituted authorities of this

State, and that Dr. Dooley is in no way accountable to the State Board of Optometry nor may his conduct in the practice of his profession be called in question by the State Board of Optometry." (R. 52).

Busch Jewelry Company, in paragraph 12 of its answer, charged:

"Defendant denies that the complainant has any cause of action and denies that the complainant has any cause of action whatever upon anything complained of in the bill of complaint filed in this cause." (R. 54).

Dr. F. M. Dooley adopted the answer of Busch Jewelry Company and each and every allegation therein. (R. 42).

The Federal constitutional right was argued by petitioners in the Chancery Court of Hinds County.

On appeal to the Supreme Court of Mississippi, the assignment of error contained the following:

"Ground 1. The Trial Court erred in holding that the State Board of Optometry has authority to maintain this suit.

"Ground 7. The construction placed by the Trial Court on the optometry statutes of this State bring them into contradiction with and into violation of Section 14 of the Constitution of this State and Article 14 of the Amendments to the Constitution of the United States, and render them unconstitutional, and the Trial Court erred in placing upon the statute an unconstitutional interpretation when the statute is susceptible of a constitutional interpretation." (R. 174-175).

After the Supreme Court of Mississippi had affirmed the decree of the Chancery Court of Hinds County, proponents filed a suggestion of error, which, among others, suggested the following as grounds of error:

"I. The Court erred in holding that Dr. F. M. Dooley was not engaged in the practice of medicine but was engaged in the practice of optometry.

"IV. The Court erred in holding that the grant and issuance of the injunction in this case did not violate the constitutional rights of Busch Jewelry Company and of Dr. F. M. Dooley as guaranteed by Section 14 of the Constitution of 1890 and Article 14 of the Amendments to the Constitution of the United States." (R. 184-185).

Hence it is clear that a right was "specially set up or claimed under the Constitution" as contemplated by U. S. C. A. Title 28, Sec. 1257(3).

(B) *The Federal Question is One of Substance and the State Court Has Decided It in a Way Probably Not in Accord With Applicable Decisions of This Court.*

The State Board of Optometry had no authority to bring or maintain this suit. The State of Mississippi had vested this power solely and exclusively in the State Board of Health. The State Board of Optometry had no ownership or possession of the cause of action it sought to enforce. It was an intermeddler without right or power in the matter. An action cannot be maintained where the right of action is not in the party suing, but in another and any judgment or decree rendered in such a proceeding is a nullity. *Haynes* vs. *Ezell,* 25 Miss. 242; *American Book Co.* vs. *Vandiver,* 178 So. 598, 181 Miss. 518; *Bowers* vs. *Bailey* (Iowa), 21 NW 2d 773; *Baldwin* vs. *Powell,* 61 N.E. 2d 412, 294 N.Y. 130. Motion denied 62 N.E. 2d 393, 294 N.Y. 840; *Thompson* vs. *Peck,* 181 A. 597, 320 Pa. 27; *Gusman* vs. *Marrero,* 180 U.S. 81, 21 S. Ct. 293, 45 L. Ed. 436. Restatement of the Law "Judgments", Sec. 9(a), p. 51.

The decision of the Supreme Court of Mississippi in this case is not in accord with its previous decisions above cited and the decision of this court in *Gusman* vs. *Marrero, supra.*

The right claimed but denied is one of substance. An un-

constitutional judicial action is just as violative of a person's constitutional right as a conviction and punishment under an unconstitutional law. *Ex Parte Converse,* 137 U.S. 624, 11 S. Ct. 191.

Conclusion

We earnestly submit that the State Board of Optometry does not have authority to maintain this suit. This suit may be brought only by the State Board of Health under the provisions of Chapter 10 of the Code of 1942 giving the State Board of Health the authority to examine and license physicians. Consequently, we urge in all sincerity that the bill of complaint in this case be dismissed, and we rest confident that such will be the action of this Honorable Court.

This, if the Court please, is our case. It is, in some sense, the case of every man engaged in a business or profession in this State, who has a profession or has property of which he may be stripped without the sanction of the law. The question is simply this: Shall we be required to meekly surrender our liberties and our constitutional rights to administrative agencies and permit them to harass our citizens under erroneously assumed authority that has never been bestowed on them by law, permit them to substitute a government by men for our constitutionally established government by law, and thereby permit such agency to establish its whim and caprice as the law of the land, to the exclusion of the legislature, which under our scheme of government is our sole and supreme legislative authority? It will be a sad day in Mississippi when administrative agencies may do their own legislating to the exclusion of the legislature, or when, by the sanction of Courts, they are declared to possess a power not conferred upon them by the legislature, either expressly or by necessary implication. Administrative agencies were instrumental in destroying the governments of Greece and Rome. We can read the handwriting upon the

wall unless we are either too blind to see or too indifferent to care. Our liberties and our future safety lie solely within the power and protection of our Courts to preserve our constitutional form of government by relentlessly and ruthlessly striking down every act of every administrative agency that has not, within the framework of our constitution, been authorized by the legislature, either expressly or by necessary implication.

Every member of this Honorable Court realizes that the legislature never intended to authorize the State Board of Optometry to bring this suit. The intention of the legislature is clear. The power to bring this suit was clearly vested by the legislature in the State Board of Health and it alone. The determination of the question of whether or not this suit should be brought has been vested by the legislature in the sound discretion of the State Board of Health. The State Board of Optometry cannot and must not, without authority of law, be permitted to exercise this discretion for the State Board of Health. Even the Courts will not exercise the discretion placed by law in an administrative body, for the legislature has said that the discretion of the administrative body and not that of the Court shall prevail, and the Court will interfere only in case of a clear abuse of discretion or an unauthorized exercise of power. *Mississippi State Board of Veterinary Examiners* v. *Watkins,* 206 Miss. 330, 40 So. 2d 153. The legislative authorization to determine whether or not to bring this suit is vested exclusively in the State Board of Health. The State Board of Optometry is unlawfully usurping this authority that has never been vested in it. Their action lies wholly outside the law, violates all of our decisions and violates the due process clauses of both our State and Federal Constitutions. This conduct demands action by this Court.

We feel that this case is surely one in which *certiorari*

should be granted and we respectfully urge upon the Court that the petition therefor be granted.

We believe we have set our course in this brief by the stars of the great moral purpose set forth in the Fourteenth Amendment and we sincerely hope that no false lights will draw this Court aside or stop it short of giving full protection to petitioners' rights thereunder.

Respectfully submitted,

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Of Counsel:

APPENDIX "A"

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 43,049

THE STATE BOARD OF OPTOMETRY, *Complainant,*

vs.

BUSCH JEWELRY CO. & DR. F. M. DOOLEY, *Defendants*

OPINION OF THE COURT

It is the opinion of the Court that the defendant, Dr. F. M. Dooley, is an agent and servant of the defendant, Busch Jewelry Company, and the said defendant, Busch Jewelry Company, pays his privilege license and charges him no rent.

The Court further finds that Dr. Dooley is not practicing medicine and is only a "front" for the defendant, Busch Jewelry Company, to practice optometry. Defendant, Dr. Dooley, is 84 years of age and testified that he served as a country doctor in various and sundry places in the State of Mississippi and other states until his retirement.

It is further the opinion of the Court that the defendant, Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is workir.g solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company.

An injunction is granted as prayed for in the petition.

By /s/ JEWELL BURTON, D.C.

Filed June 22, 1952

FRANK T. SCOTT, *Chancery Clerk*

APPENDIX "B"

IN THE SUPREME COURT OF MISSISSIPPI

No. 38,670

(Opinion Rendered February 9, 1953)

17,806

Busch Jewelry Company, *et al,*

vs.

The State Board of Optometry

Hall, *Justice:*

Appellee brought suit to enjoin Busch Jewelry Company and Dr. F. M. Dooley from unlawfully engaging in the practice of optometry. This appeal is from a decree granting the relief prayed for and the sole question presented is whether appellee has authority to bring such a suit in view of the fact that Dr. Dooley is a licensed medical doctor and not an optometrist.

Chapter 431, Laws of 1946, (Section 8923-51, Supplement to Code of 1942) provides that "An action for any injunction may be brought and maintained in the name of any state board authorized to hold examinations and grant license to practice any profession to enjoin and prohibit any person from the practice of any profession required to be licensed by said board, when such person is practicing said profession and has not been granted a license therefor."

Our statutes defining the practice of optometry, regulating the same, and providing for examinations for license to practice that profession are found as Sections 8832-8846, Code of 1942. Section 8846 provides that "The provisions of this chapter shall not apply to physicians or surgeons practicing under authority of licenses issued under the laws of this state for the practice of medicine or surgery." Appellants contend that since Dr. Dooley is a licensed physician the State Board of Optometry has no authority to

bring or maintain this suit, and that such authority is vested solely in the State Board of Health.

The record shows that Busch Jewelry Company is a corporation operating several stores in Mississippi as well as numerous stores in other states. Its home office is in Birmingham, Alabama, where lenses for its optical department are ground and finished and from which point they are mailed to its local stores for delivery to customers. Dr. Dooley is 84 years of age and began the practice of medicine in 1890. After following his profession at numerous places in Mississippi and Louisiana he retired from the practice in 1936 or 1937 and later took up the fitting and prescribing of glasses for the correction of defects in vision. He is regularly employed by the company at a salary of $400.00 per month and devotes his entire time to the business of that company in the examination of eyes and prescribing spectacles; this is done in an office furnished to him free of rent by the company in its store at Jackson and with the use of equipment furnished him by the company. He charges no fee for examinations and his prescriptions are filled by the company. He admits that he is practicing optometry but says that he considers his work as coming under his license as a physician. The company paid privilege licenses for him both as an optometrist and as a physician.

In the case of *Sears, Roebuck & Co. et al* v. *State Board of Optometry,* 213 Miss. 710, 57 So. 2d 726, we held that our statutes governing the practice of optometry have the effect of prohibiting a corporation from practicing optometry through a licensed employee and that the exemptions of the statute do not exempt corporations which undertake to perform optometrical work through a licensed employee. It is undisputed that Busch Jewelry Company is engaged in optometrical work and we think it makes no difference whether that work is done by a licensed optometrist or a licensed physician. In either event the State Board of Optometry has the right under Section 8923-51 to bring and maintain an action to enjoin the company from engaging in the practice of optometry. Numerous decisions from other courts so hold and we shall mention a few of them.

In *Ritholz, et al* v. *Arkansas State Board of Optometry,*

206 Ark. 671, 177 S. W. 2d 410, it was held that an injunction was properly granted against National Optical Stores Company, then a partnership, prohibiting it from engaging in the practice of optometry notwithstanding the fact that the examinations made and the prescriptions issued for glasses for the correction of defects in vision were by a duly licensed physician who was employed by the company on a salary basis.

In *Ritholz et al* v. *Commonwealth of Virginia,* 184 Va. 339, 35 S. E. 2d 210, it was likewise held that the same company, operating as a partnership, was engaged in the practice of optometry from which it was enjoined even though the examinations were made and prescriptions issued by licensed physicians in its employment. That case cites with approval the Arkansas case above mentioned as well as cases from Wisconsin, Washington and Massachusetts which hold to the same effect.

In *State ex rel Loser, Attorney General,* v. *National Optical Stores (a corporation),* 189 Tenn. 433, 225 S. W. 2d 263, it was held that the device whereby the company uses the services of medical doctors in the examination of eyes and the writing of prescriptions was simply an effort to evade the law governing the practice of optometry, and an injunction to prevent such practice was upheld. The above mentioned cases are cited in the opinion as well as numerous others, including *Ezell* v. *Ritholz,* 188 S. C. 39, 198 S. E. 419, which is to the same effect.

In *State Board of Optometry v. Gilmore, et al,* 147 Fla. 776, 3 So. 2d 708, the Supreme Court of Florida had before it the identical question which is here presented. The Florida Act regulating the practice of optometry is similar to our statutes (Chapter 19031, Vol. 1, General Laws of Florida 1939). It provides that "the terms and provisions of this Act shall not apply to duly licensed physicians and surgeons now or hereafter." The facts as stated in the opinion in that case were: "Gilmore operates a jewelry store and in connection with it an optical department where Bertrem, a licensed physician, is employed. The latter engaged in no other work than the practice of optometry for Gilmore who pays him a 'straight salary'." Under these facts the Court

said: "If one practices optometry on his own account and responsibility he is by schooling presumed properly equipped and there is no need to examine into his fitness, the diagnoses and prescriptions for correction and relief of the human eye being an incident to and included in his medical education. But when a physician steps out of character and becomes the employee of a person himself not entitled to engage in the profession of optometry a direct violation of section eleven results."

"The provision of the act of which appellee Gilmore has run afoul denounces the employment upon a salary basis of 'any person licensed to practice optometry'. Here qualifications are not the criterion but the act condemned by the legislature is the hiring by one unlearned in the profession of another who is permitted by his knowledge to engage in it. * * *

"We do not find a purpose common to the inhibition against employment of a licensed optometrist and the exemption of physicians from the terms of the act. The former relates to and illegalizes the hiring by laymen of optometrists, however qualified; the latter exempts physicians, as such, from further examination to establish their skill as optometrists."

Now it is true that section eleven of the Florida Act specifically prohibits an unlicensed person or corporation from employing a licensed person to carry on the business while our legislative acts do not specifically so prohibit, but our decision in the Sears, Roebuck case, *supra,* does condemn that practice and declare it unlawful and subject to prohibition by injunction. The Florida Court enjoined the physician from engaging in the practice of optometry under such an arrangement as that shown in the case at bar for the reason that he has stepped out of his character as a physician when he becomes the employee of one not licensed to practice optometry and thereby lends his license as a physician to the unlawful practice of optometry. Our statute does not authorize a physician to unlawfully engage in the practice of optometry but merely permits him to lawfully engage in that profession on the faith of his license as a physician without requiring him to take a further exam-

ination as to his qualifications as an optometrist. When he abandons the practice of medicine and unlawfully engages in the practice of optometry by becoming an employee of one not authorized to practice that profession we think both the employer and the employee are subject to injunction at the instance of the State Board of Optometry and that the physician in such case cannot hide behind his license to practice medicine. The chancellor was justified in finding from the evidence, as he did, that Dr. Dooley is not practicing medicine but is only a "front" for Busch Jewelry Company in unlawfully practicing optometry. By the decree appealed from Dr. Dooley was not enjoined from practicing medicine but only from unlawfully practicing optometry. He is still permitted to practice medicine or optometry on his own account in a lawful manner. The decree of the lower court is therefore affirmed.

Affirmed.

McGehee, C.J., and Lee, Arrington and Ethridge, JJ., Concur.

(8508)

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HAROLD B. WILLEY,

In The
Supreme Court of the United States

OCTOBER TERM 1953

No. 134

BUSCH JEWELRY COMPANY, a corporation,
and DR. F. M. DOOLEY,
Petitioners,

VERSUS

THE STATE BOARD OF OPTOMETRY,
Respondent.

BRIEF OF RESPONDENT

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JULY, 1953.

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In The
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BUSCH JEWELRY COMPANY, a corporation,
and DR. F. M. DOOLEY,
Petitioners,

VERSUS

THE STATE BOARD OF OPTOMETRY,
Respondent.

BRIEF OF RESPONDENT

INTRODUCTION

The Mississippi State Board of Optometry sued Busch Jewelry Company, a corporation, and Dr. F. M. Dooley, in the Chancery Court of Hinds County, Mississippi, charging both defendants with unlawfully practicing Optometry and prayed for an injunction. There

was a decree in the lower court holding both defendants guilty of practicing Optometry in violation of Sections 8832 to 8846, both inclusive, of the 1942 Code and granting an injunction as prayed for on June 22, 1952 (R. 163-4). Defendants appealed to the Mississippi Supreme Court and on February 9, 1953, the decision of the Chancery Court was affirmed (R. 177-182). It is our contention on this appeal, that the decree of the Chancery Court as affirmed by the Mississippi Supreme Court was constitutional and the Petition for Writ of Certiorari should be denied.

OUTLINE OF PLEADINGS

The Summary Statement of Matters Involved as made by Counsel for the Petitioners is substantially correct as outlining the pleadings and statutes upon which this matter was heard in the Chancery Court of Hinds County, Mississippi and in the Supreme Court of Mississippi.

STATEMENT OF FACTS

The Statement of Material Facts as made by Counsel for Petitioners should be amplified and the following additional facts shown.

DR. DOOLEY testified that as his wife got older she became very nervous and was practically an invalid for a long time (R. 129). And as follows (R. 130, 132):

Q. "What effect did that have on your ability to continue in the practice of medicine and go out and visit with your patients?

A. That is why I quit. I had to quit.

Q. When did you quit the active medical practice of a country doctor?

A. In '36 or '37, I believe.

Q. About 1936 or 1937?

A. Yes. I think it was '37.

Q. At that time, what work did you start to doing, Dr. Dooley?

A. I went into this business, then, of refraction, fitting glasses.

* * * * *

Q. What is the stipulated salary you are working for there now, Dr. Dooley?

A. $400.00 a month.

Q. Are you furnished and provided with any equipment there for the testing of the eyes?

A. Yes. They have that old Army regulation equipment, a trial case and charts of all kinds that they use everywhere. The trial case is a case about that wide and about that high (indicating) with all kinds of lenses in there, every lens you might want to use, and they have a trial frame that holds these lenses, and then of course you look at your object and read what you can read and decide about his eyes.

Q. Now then, do you have any other instruments in there, in the office?

A. Yes. I have a nice little ophthalmoscope and a combination retinoscope. I don't use them much. Busch Jewelry Company rather discouraged using the ophthalmoscope. He said

only an oculist is supposed to use those. In fact, you can't use them very well unless you use what they call dilators. You can't see much with an ophthalmoscope unless you dilate the pupils."

The current privilege license of Dr. Dooley was introduced by Appellants as Exhibit 1 to the testimony of Dr. Dooley (R. 136). This privilege and license shows *Dr. Dooley licensed as both an Optometrist and a Physician and the tax paid for each.* On cross-examination Dr. Dooley admitted that Busch Jewelry Company made the payment of the $20.00 for this privilege license (R. 194).

On cross-examination DR. DOOLEY testified as follows with reference to examination fees and his examinations (R. 140):

Q. "If any examination fees are paid now by the patient, do you turn those over to Busch?

A. They are paid to Busch. I don't collect them, no.

Q. So everything that is paid, the examination fee and the price of the glasses, is paid to Busch Jewelry Company?

A. Yes, sir.

Q. Actually, to serve the function that you are there for, all you need to do is examine the patient's eyes with the trial case, isn't it?

A. Yes, as a rule. Yes, sir.

Q. The more complicated cases, then, that you find, you send them to an oculist?

A. Yes, sir. If I can't fit them, I send them to an oculist. I find cases occasionally that I can't fit very well and I don't want to take a chance."

Again, with reference to the matter of DR. DOOLEY being engaged in the active practice of medicine we quote as follows (R. 141):

Q. "Dr., are you a member of the Mississippi Medical Society?

A. Well, I haven't paid any fees in years, especially since I dropped out of the active practice, I never have. I can't say I am a member.

Q. Since you dropped out of the active practice of medicine—

A. I dropped the whole thing.

Q. That is the Medical Association, the Medical Society and all?

A. Yes, sir."

DR. DOOLEY admits that all he does for Busch Jewelry Company is to refract the eyes of their customers and admits that he is practicing optometry as shown in the record as follows (R. 142):

Q. "But all you do for Busch is refract the eyes of customers of theirs who come into the store, isn't it?

A. Yes, sir.

Q. Now, Dr. Dooley, you are practicing optometry, are you not?

A. Well, if I understand what an optometrist is, I suppose so. That was my impression, that an optometrist was a man who practiced refraction and correcting the vision. I suppose that is what an optometrist is."

It was stipulated between the parties that Dr. Dooley has not held a narcotic license to dispense narcotics as a physician since 1940 (R. 69).

OPINION OF THE CHANCERY COURT

"It is the opinion of the court that the defendant, Dr. F. M. Dooley, is an agent and servant of the defendant, Busch Jewelry Company, and the said defendant, Busch Jewelry Company, pays his privilege license and charged him no rent.

"The court further finds that Dr. Dooley is not practicing medicine and is only a 'front' for the defendant, Busch Jewelry Company, to practice optometry. Defendant, Dr. Dooley, is 84 years of age and testified that he served as a country doctor in various and sundry places in the State of Mississippi and other states until his retirement.

"It is further the opinion of the court that the defendant, Busch Jewelry Company, did not employ Dr. Dooley because of any learning or knowledge of the eye that he may have, but solely for the purpose of the practice of optometry by the defendant jewelry company. The defendant, Dr. Dooley, cannot work for the best interest of the unfortunate persons coming into the jewelry store for examination of eyes, but is working solely for the best interest of the defendant jewelry company. In order for the defendant, Dr. Dooley, to receive his pay it is necessary that he prescribe glasses to be sold to the patients by the defendant jewelry company.

"An injunction is granted as prayed for in the petition."

DECREE OF THE CHANCERY COURT

"This cause coming on for hearing on the Bill of Complaint and demurrers thereto on the 20th day

of May, 1952, and the complainant being present and represented by Richard A. Billups, Jr., Attorney, and the defendants being present and represented by Barnett, Jones, and Montgomery, Attorneys, and all parties announcing ready for trial, the court proceeded to hear the evidence and requested parties to submit briefs; and thereupon the court took the case under advisement for final decision in vacation or term time.

"Thereafter on the 12th day of June, regular term time, the court having carefully considered and weighed the evidence adduced and the argument, and being fully advised in the premises, finds and adjudges that the complainant is entitled to the relief prayed for.

"The written opinion of the court is hereby made a part of this decree.

"It is therefore ordered, adjudged, and decreed that the defendants, Busch Jewelry Company, a corporation, and Dr. F. M. Dooley and those acting under or for them are hereby forever enjoined, restrained, and prohibited from the unlawful practice of optometry either directly or indirectly and the defendant Busch Jewelry Company, a corporation, is hereby forever enjoined, restrained, and prohibited from employing by any means registered optometrists or physicians and surgeons to examine the eyes of its customers and prescribe eyeglasses in the State of Mississippi.

"It is further ordered that the defendants pay the costs.

"Whereupon, in open court, the defendants prayed for an appeal to the Supreme Court of Mississippi, with supersedeas, which appeal is hereby allowed, except the same shall be without supersedeas, and bond is hereby fixed at not less than $500.00.

"Ordered, adjudged and decreed on this the 24th day of June, 1952.

"J. C. Stennett, Special Councellor."

ARGUMENT

POINT I

A corporation cannot practice the professions of medicine, law, dentistry and optometry by the employment of licensed practitioners.

In the very recent case of *Sears, Roebuck & Co.* v. *State Board of Optometry*, 57 So. 2d 726, the Mississippi Supreme Court clearly held that the Optometry Act prohibited a corporation from practicing optometry through a licensed employee as follows:

> "We think that the Optometry Act has the effect of prohibiting a corporation from practicing optometry through a licensed employee. This appears to be the legislative purpose. And this conclusion is in accord with the substantial weight of authority from other states as well. 13 Am. Jur., Corporations, Sec. 837, summarizes the rule: 'It is generally held that in the absence of express statutory authority a corporation may not engage in the practice of optometry either directly or indirectly through the employment of a duly registered optometrist.' See also 41 Am. Jur., Physicians and Surgeons, Sec. 28; 19 C.J.S., Corporations, pp. 411-412; 70 C.J.S., Physicians and Surgeons, pp. 843-844.
>
> "The statute requires a practitioner of optometry to be a 'person,' who is over 21 years of age, of good moral character, who has graduated from a reputable school of optometry, maintaining a two-year course, and who has passed the required examination. It is

apparent that no corporation is entitled to be registered and to practice optometry through employees under these requirements. Other courts have reached this same result. In *State ex rel. Beck* v. *Goldman Jewelry Company*, 142 Kan. 881, 51 Pac. 2d 995, 102 A.L.R. 334 (1935), the Kansas statute was similar in many respects to the Mississippi Act, and the court so held.

"The statute in *Funk Jewelry Co.* v. *State ex rel. LaPrade*, 50 Pac. 2d 945 (Ariz., 1935), established similar requirements as to who was entitled to practice optometry: He must be over 21 years of age, of good moral character, etc. The court said: 'The qualifications of an optometrist, as thus outlined, of course exclude a corporation from the practice. It cannot qualify and cannot obtain a certificate of registration. It is not of the class of persons the Legislature intended to authorize to practice optometry. It does not possess the necessary moral and intellectual qualities.'

"The rationale of the foregoing corporate prohibition is closely related to the legislative purpose and power of designating optometry as a profession. This clarifies the constitutional validity of the Mississippi statutes based upon the police power of the State. And the great weight of authority holds that the Legislature has the power to define optometry as a profession and to regulate it as such. Anno., 98 A.L.R. 905. Some of the many cases holding that a Legislature has validly classified optometry as a profession for regulatory purposes are *State ex rel. Loser* v. *National Optical Stores Co.*, 225 S.W. 2d 263 (Tenn., 1945); *State ex rel. Sisemore* v. *Standard Optical Company of Oregon*, 188 Pac. 2d 309 (Ore., 1947); *Kindall* v. *Beiling*, 175 S.W. 2d 489 (Ky., 1943); *State ex rel. Standard Optical Co.* v. *Superior Court*, 17 Wash. 2d 323, 135 Pac. 2d 839 (1943); *Neill* v. *Gimbel Bros., Inc.*, 330 Pa. 213,

199 Atl. 178 (1938); *Funk Jewelry Co.* v. *State ex rel. LaPrade*, 50 Pac. 2d 945 (Ariz., 1935); *McMurdo* v. *Getter*, 10 N.E. 2d 139 (Mass., 1937). Illustrative of these decisions is *State ex rel. Sisemore* v. *Standard Optical Co. of Oregon*, 188 Pac. 2d 309 (Ore., 1947), in which the Court said:

"The practice of optometry is undoubtedly one of the subdivisions of the practice of medicine, which have arisen in modern times by reason of the necessity of specialization. It would seem that the public has as much need to be protected from quacks and charlatans in optometry as in dentistry or any other subdivision of medicine. *Semler* v. *Oregon State Board of Dental Examiners*, 148 Or. 50, 53, 34 P. 2d 311. One who consults an optometrist for ocular examination is entitled to the same undivided loyalty that he should receive from a physician. The fact that the optometrist is the employe of an optical concern whose main interest is the sale of optical goods tends to be a distracting influence which may adversely affect his loyalty to the interests of his patient."

The overwhelming weight of authority supports the decision in the *Sears, Roebuck & Co.* v. *State Board of Optometry, supra*, and numerous other states have come to the same conclusion in the following cases from which quotations are made in the brief of appellee filed in the Supreme Court of Mississippi. (A certified copy of said brief is to be found among the original exhibits sent up by the Supreme Court of Mississippi.) *Ritholz et al.* v. *Arkansas State Board of Optometry*, 177 S.W. 2d 410, decided in 1944. *State ex rel. Loser, Attorney General* v. *National Optical Stores Co.*, 225 S.W. 2d 263, decided by the Supreme Court of Tennessee, De-

cember 17, 1949. *State ex rel. Sisemore* v. *Standard Optical Company of Oregon*, 188 P. 2d 309, decided by the Supreme Court of Oregon, December 23, 1947. *Ritholz et al.* v. *Commonwealth of Virginia et al.*, decided by the Supreme Court of Appeals of Virginia, 35 S.E. 2d 210, on September 5, 1945. *Kindall et al.* v. *Beilling*, 175 S.W. 2d 489, Court of Appeals of Kentucky, decided October 1, 1943. *State ex rel. Standard Optical Co.* v. *Superior Court for Chelan County et al.*, 135 P. 2d 839, decided by the Supreme Court of Washington, March 29, 1943. *Leibernem* v. *Connecticut State Board of Examiners in Optometry*, 34 A. 2d 213, Supreme Court of Error of Connecticut, decided July 7, 1943.

The United States Supreme Court has held that such regulation is not an unreasonable exercise of the protective power by the State, in the case of *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. ed. 1086:

> "Plaintiff is not entitled to complain of interference with the contracts he describes, if the regulation of his conduct as a dentist is not an unreasonable exercise of the protective power of the State. His contracts were necessarily subject to that authority. *Rast* v. *Van Deman & L. Co.*, 240 U.S. 342, 363, 60 L. ed. 679, 689, 36 S. Ct. 370, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455; *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.*, 248 U.S. 372, 375, 376, 63 L. ed. 309, 311, 39 S. Ct. 117, 9 A.L.R. 1420, P.U.R. 1919C, 60; *Sproles* v. *Binford*, 286 U.S. 374, 391, 76 L. ed. 1167, 1180, 52 S. Ct. 581; *Stephenson* v. *Binford*, 287 U.S.

251, 276, 77 L. ed. 288, 301, 53 S. Ct. 181, 87 A.L.R. 721. Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each. We find no basis for the charge of an unconstitutional discrimination. *Watson* v. *Maryland*, 218 U.S. 173, 179, 54 L. ed. 987, 990, 30 S. Ct. 644; *Miller* v. *Wilson*, 236 U.S. 373, 384, 59 L. ed. 628, 632, 35 S. Ct. 342, L.R.A. 1915F, 829; *Missouri ex rel. Hurwitz* v. *North*, 271 U.S. 40, 43, 70 L. ed. 818, 821, 46 S. Ct. 384; *Dr. Bloom Dentist* v. *Cruise*, 288 U.S. 588, 77 L. ed. 967, 53 S. Ct. 320.

"The question is whether the challenged restrictions amount to an arbitrary interference with liberty and property and thus violate the requirement of due process of law. That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. *Douglas* v. *Noble*, 261 U.S. 165, 67 L. ed. 590, 43 S. Ct. 303; *Graves* v. *Minnesota*, 272 U.S. 425, 427, 71 L. ed. 331, 334, 47 S. Ct. 122. The State may thus afford protection against ignorance, incapacity and imposition. *Dent* v. *West Virginia*, 129 U.S. 114, 122, 32 L. ed. 623, 626, 9 S. Ct. 231; *Graves* v. *Minnesota, supra.* We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals *(State Dental Examiners* v. *Miller*, 90 Colo. 193, 8 P. (2d) 699, 287 U.S. 563, 77 L. ed. 496, 53 S. Ct. 6), and that it may prohibit advertising that tends to mislead the public in this respect. *Dr. Bloom, Dentist* v. *Cruise*, 259 N.Y. 358, 363, 182 N.E. 16, 288 U.S. 588, 77 L. ed. 967, 53 S. Ct. 320.

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The Legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

From the holdings in the foregoing cases it is plainly evident that the petitioner, Busch Jewelry Company is definitely and unlawfully engaged in the practice of optometry in Mississippi and Dr. Dooley, in aiding and abetting Busch Jewelry Company in doing so, is himself clearly engaged in the unlawful practice of optometry and the Mississippi Courts quite properly enjoined them both from such unlawful practice of optometry.

POINT II

Any State Board which grants license "to practice any profession" is authorized under Mississippi Laws 1946, Chapter 431, Code of 1942, Supp. Sections 8923-51 (R. 177), to obtain an injunction in chancery against any person practicing such profession without a license.

The above is taken almost *verbatim* from the case of *Sears, Roebuck & Co.* v. *State Board of Optometry, supra,* when the Mississippi Supreme Court said:

> "Another aid in determining the professional nature of an optometrist's work under the Mississippi Statute is the act upon which this suit is based. Miss Laws 1946, Ch. 431, being Code of 1942, supp., Secs. 8923-51. It authorizes any state board which grants licenses 'to practice any profession' to obtain an injunction in chancery against any person practicing without license."

It is virtually undisputed, and the Chancery Court so held, that Busch Jewelry Company was practicing optometry without a license and unlawfully and the State Board of Optometry had every right to bring this action. The real test is determined by the unlawful and unlicensed act and is not limited by the right of the State Board to issue the license. Petitioners contend the State Board of Optometry has no right to bring this action, notwithstanding the fact that both Busch Jewelry Company and Dr. Dooley were found to be practicing optometry, simply because Dr. Dooley is a licensed physician.

Suppose, for the sake of argument, that Busch Jewelry Company had employed both a physician and an optometrist to do their refracting as many stores do. According to petitioners' contention only the State Board of Health could bring an action against the physician and Busch Jewelry Company to enjoin the physician and Busch Jewelry Company from their unlawful practice, and only the State Board of Optometry could bring an action against the optometrist and Busch Jewelry Company, to enjoin their unlawful practice because the State Board of Health cannot license an optometrist. Then if the State Board of Health and State Board of Optometry did not seek an injunction at the same time the clearly unlawful practice of optometry by the corporation, Busch Jewelry Company, could never be stopped. The position of petitioners is further made untenable when one supposes that Busch Jewelry Company, in operating as they do now, had employed a man to do their refracting who was neither qualified as a physician nor an optometrist. Under their theory neither the State Board of Health nor the State Board of Optometry could act, since neither could issue him a license.

We urge that such a theory is not sound and cannot be followed and this injunction statute clearly gives the right to act to the State Board of Optometry since Busch Jewelry Company is engaged in the unlawful and unlicensed practice of optometry and Dr. Dooley is aiding

and abetting Busch Jewelry Company in such practice. The respondent admits that Dr. Dooley can engage in the lawful practice of optometry wherever he may choose, and the Mississippi Supreme Court so held, but he certainly cannot serve as a "front" and let his license be used to enable Busch Jewelry Company to engage in the unlawful practice of optometry, as the Chancery Court held he was doing.

Our position is further strengthened by the fact that Busch Jewelry Company in all their advertising, as shown by the exhibits now in evidence, advertises its "modern optical department" and in each of these ads the word "optical" appears. We have searched in vain in these advertisements, for the words "medical department" in support of petitioners' contention that they have been practicing medicine all along. It appears self-evident from the evidence, that Busch Jewelry Company has held itself out as being engaged in the practice of optometry and, their contention now made, that they are practicing medicine appears to be nothing more than an obvious effort to get around the optometry law and the clear cut decision in the *Sears, Roebuck & Co.* v. *State Board of Optometry case.*

Certainly the overwhelming weight of authority now holds that a corporation cannot engage in the practice of optometry through the employment of licensed practitioners and there is no judicial dissent from the proposition that a corporation cannot practice medicine

through an employed practitioner. Petitioners admit in the pleadings, and in their brief contend, that Dr. Dooley is practicing medicine as an employee of Busch Jewelry Company for its exclusive benefit, and such practice, on the part of both, is clearly unlawful. The only reasonable interpretation that can be placed on petitioners' contention is that they admit their operation is unlawful but say the State Board of Optometry has no right to bring an action to stop their unlawful practice.

In *Sears, Roebuck & Co.* v. *State Board of Optometry, supra,* the Mississippi Supreme Court affirmed the decree of the lower court as follows:

> "The Chancery Court in its final decree enjoined Sears and Craftsman from the practice of optometry 'directly or indirectly,' and from employing, by any means, registered optometrists or physicians and surgeons to examine the eyes of their customers and prescribe eye glasses in the State of Mississippi."

A similar decree was entered in the case at Bar and this is the same wording used in many of the cases from other jurisdictions involving the unlawful practice of optometry. When one analyses the situation it is the only adequate wording for the decree, because otherwise, a corporation so engaged in the unlawful practice of optometry could effectively defeat the ends of justice by switching back and forth from the employment of physicians to optometrists, depending on which State Board was currently taking action against them.

While many of the reported cases, on the unlawful practice of optometry, involved actions brought by optometry boards against corporations and business concerns employing both optometrists and physicians, we find in the following case where a similar contention was made, involving the exemption in the optometry law of a physician, and in this case the Supreme Court of Florida held against such a narrow and limited construction. From the case of *State Board of Optometry* v. *Gilmore et al.*, 3 So. 2d 708, we quote as follows:

> "The Florida State Board of Optometry sought an order enjoining Millard G. Gilmore, an employer, and his employees, Albert Sidel and J. Willie Bertrem, from practicing optometry, with the result that the Chancellor restrained Sidel from the activity and prohibited Gilmore from allowing Sidel 'as his employee or upon his business premises' to engage in that vocation. Upon the conclusion that there was no proof that Gilmore himself was practicing optometry 'the application of the plaintiff for an injunction restraining him * * * from continuing his employment of the defendant, J. Willie Bertrem * * *' was denied.
>
> "It is the latter provision which gave rise to this appeal and prompted the appellant to present the problem whether, in view of Chapter 19031, Laws of Florida, Acts of 1939, a jewelry store may 'employ a licensed physician to devote his full time to the practice of optometry for its account and in its name.'
>
> "We summarize the acts described in the stipulations of counsel so far as they are relevant to the question involved: Gilmore operates a jewelry store and in connection with it an optical department where Bertrem, a licensed physician, is employed.

The latter engages in no other work than the practice of optometry for Gilmore, who pays him a 'straight salary.'

"The Act, Chapter 19031, was intended to cover fully the regulation and supervision of optometry, declared a profession and carefully defined in section one. In section eleven it is made 'unlawful for any corporation, lay body, organization, group, or lay individual to engage in, or undertake to engage in, the practice of Optometry through means of engaging the services upon a salary, commission, or lease basis, or by other means or inducement, any person licensed to practice Optometry in the State of Florida.'

"If we were to pause here without further examination of the above law it would appear that a clear violation of the quoted inhibitions had been shown because of the employment of one not licensed of another to practice optometry for him 'upon a salary * * * basis.' In reply appellee quotes section eight, especially emphasizing that portion of it which we italicize: 'It shall be unlawful for any one to practice optometry in this State without first procuring a certificate of registration and license * * * provided that *the terms and provisions of this Act shall not apply to duly licensed physicians and surgeons now or hereafter.*'

"The appellees urge us to construe the part of the act last quoted to free all physicians from the restrictions imposed generally upon those who are priviledged to represent themselves as optometrists. It will be noted that although the terms and provisions of the act are declared there not to affect physicians such exception is included in the section making it unlawful to practice without registration and license.

"It is patent that physicians are exempt because their training is so thorough that they are fitted to perform those services for which optometrists too

are qualified, thus physicians, as such, were not required to procure a 'certificate of registration and license as a registered optometrist' to practice optometry lawfully. If one practices optometry on his own account and responsibility he is by schooling presumed properly equipped and there is no need to examine into his fitness, the diagnoses and prescriptions for correction and relief of the human eye being an incident to and included in his medical education. But when a physician steps out of character and becomes an employee of a person himself not entitled to engage in the profession of optometry a direct violation of section eleven results.

"The provision of the act of which appellee Gilmore has run afoul denounces the employment upon a salary basis of 'any person licensed to practice Optometry.' *Here qualifications are not the criterion but the act condemned by the Legislature is the hiring by one unlearned in the profession of another who is permitted by his knowledge to engage in it.*

"The evil sought to be prevented by such a relationship may be tersely stated. In this situation the responsibility of the employee in the performance of services so important to those whose eyes are abnormal as to be dignified with the most undeserved title, 'professional' *(McMurdo* v. *Getter,* 298 Mass. 363, 10 N.E. 2d 139, 142), is confused with his loyalty to the employer, while the latter although unskilled in the work is accountable to the patients to whom he is not personally permitted to minister. The result, as was decided by the Supreme Court of Massachusetts, *McMurdo* v. *Getter, supra,* is a broken relationship 'between a professional man and those who engaged his services.' See also *Ezell* v. *Ritholz,* 188 S.C. 39, 198 S.E. 419. Such conflicting loyalties should not be encouraged.

"We do not find a purpose common to the inhibition against employment of a licensed optometrist and the exemption of physicians from the terms

of the act. The former relates to and illegalizes the hiring by laymen of optometrists, however qualified; the latter exempts physicians, as such, from further examination to establish their skill as optometrists."

In the Mississippi Supreme Court opinion, in the case at Bar, ably written by Mr. Justice Hall, it was stated that the sole question presented in the appeal was whether the State Board of Optometry had authority to bring this suit in view of the fact that Dr. Dooley was a licensed medical doctor and not an optometrist. In the opinion we find:

"Dr. Dooley is 84 years of age and began the practice of medicine in 1890. After following his profession at numerous places in Mississippi and Louisiana he retired from the practice in 1936 or 1937 and later took up the fitting and prescribing of glasses for the correction of defects in vision. He is regularly employed by the company at a salary of $400.00 per month and devotes his entire time to the business of that company in the examination of eyes and prescribing spectacles; this is done in an office furnished to him free of rent by the company in its store at Jackson and with the use of equipment furnished him by the company. He charges no fee for examinations and his prescriptions are filled by the company. He admits that he is practicing optometry but says that he considers his work as coming under his license as a physician. The company paid privilege licenses for him both as an optometrist and as a physician.

"It is undisputed that Busch Jewelry Company is engaged in optometrical work and we think it makes no difference whether that work is done by a licensed optometrist or a licensed physician. In either event the State Board of Optometry has the

right under Section 8923-51 to bring and maintain an action to enjoin the company from engaging in the practice of optometry.

"Now it is true that section eleven of the Florida Act specifically prohibits an unlicensed person or corporation from employing a licensed person to carry on the business while our legislative acts do not specifically so prohibit, but our decision in the *Sears, Roebuck case, supra,* does condemn that practice and declare it unlawful and subject to prohibition by injunction. The Florida Court enjoined the physician from engaging in the practice of optometry under such an arrangement as that shown in the case at bar for the reason that he has stepped out of his character as a physician when he becomes the employee of one not licensed to practice optometry and thereby lends his license as a physician to the unlawful practice of optometry. Our statute does not authorize a physician to unlawfully engage in the practice of optometry but merely permits him to lawfully engage in that profession on the faith of his license as a physician without requiring him to take a further examination as to his qualifications as an optometrist. When he abandons the practice of medicine and unlawfully engages in the practice of optometry by becoming an employee of one not authorized to practice that profession we think both the employer and the employee are subject to injunction at the instance of the State Board of Optometry and that the physician in such case cannot hide behind his license to practice medicine. The chancellor was justified in finding from the evidence, as he did, that Dr. Dooley is not practicing medicine but is only a 'front' for Busch Jewelry Company in unlawfully practicing optometry. By the decree appealed from Dr. Dooley was not enjoined from practicing medicine but only from unlawfully practicing optometry. He is still permitted to practice medicine or optometry on his own account in a lawful manner."

We therefore urge that the Mississippi Supreme Court was eminently correct in holding that the State Board of Optometry had the right to bring this action to stop the unlawful practice of optometry by the defendants Busch Jewelry Company and Dr. Dooley.

POINT III

The statutes here involved do not violate Section 14 of the State Constitution and Article 14 of the Amendments to the Constitution of the United States.

The question of the constitutionality of the Optometry Act was raised by appellants in *Sears, Roebuck & Co.* v. *State Board of Optometry, supra,* and our Mississippi Supreme Court in passing on this constitutional question held as follows:

> "Legislative classification of optometry as a profession and regulation of it as such constituted a valid exercise of police power of state.
>
> "Statutes having the effect of prohibiting a corporation from practicing optometry through employment of a licensed optometrist are not for that reason unconstitutional."

The statute authorizing the bringing of an injunction is clearly a valid exercise of police power by the state. The provisions of the optometry law of Illinois were likewise held to be constitutional in the very recent case of *Klein* v. *Department of Registration et al.,* 105 N.E. 2d 758, decided March 20, 1952, and rehearing denied May 19, 1952. The Illinois Supreme Court in

passing on provisions of the Illinois Optometry Act restricting advertising etc., held as follows:

"Robert Klein, registered optometrist, brought action against the Department of Registration and Education, and others, to enjoin enforcement of the Illinois Optometric Practice Act. The Superior Court, Cook County, Joseph A. Graber, J., entered a decree granting injunctive relief, and defendants appealed. The Supreme Court, Daily, C. J., held that the act was constitutional.

"Reversed and remanded with directions."

Syllabi:

"1. Practice of optometry is related to public health and welfare and is subject to regulation under police power of state.

* * * * *

"7. Learned professions are subject to higher ethical code and more rigid exercise of police power.

* * * * *

"10. It is common knowledge that the eye continues to vary from normal even when spectacles are worn and that in some instances spectacles may have corrective effect of causing eye to return to normal.

* * * * *

"15. Optometric Practice Act regulating display of name and title of optometrist and advertising signs, manner of placing of name and title of optometrist in directories, and advertising matter in office windows or reception rooms where visible from streets, was calculated to eliminate injurious effects of uninhibited advertising and to safeguard against deception and unseeming rivalry and valid exercise of police power.

* * * * *

"18. Every presumption is in favor of validity of statutes which promote public health and welfare,

and construction which would render statute obnoxious to constitution is to be avoided if possible.

"19. All doubts or uncertainties arising from language of an act be resolved in favor of validity.

"20. If main intent of statute can be collected from statute, words may be modified or altered, declared surplusage or even supplied so as to obviate any repugnancy or inconsistency with legislative intent."

In the body of the opinion:

"While at first blush it would seem that Sections 13 (K), (L) and (M) appear to be an arbitrary interference with the right of one to practice optometry, such thoughts are dispelled when the relative aspects of public health and welfare are considered. As pointed out in *Semlar* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 572, 79 L. ed. 1086, the legislature is not dealing with traders in commodities but with the vital interest of public health and the treatment of bodily ills. The public is concerned not only with the maintenance of standards which will insure competency in the individual practitioner, but protection against those 'who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.' In addition, the community is concerned in providing safeguards not only against deception, but against practices which tend to demoralize the business or profession by forcing its members into unseeming rivalry, which would tend to enlarge the opportunity of the least scrupulous. Advertising by large display, glaring and lighted signs or by depicting a part of the human body, and other forms of advertising, have been held to produce such undesired results and accompanying detriment to the public welfare."

This Illinois case of *Klein* v. *Department of Registration and Education et al., supra,* was presented to this

Honorable Court and on October 20, 1952, Certiorari was denied, 73 S. Ct. Advance Sheets 93.

CONCLUSION

In conclusion we earnestly submit that the State Board of Optometry does have authority to maintain this suit and there is nothing unconstitutional in the Mississippi Optometry Act and the injunction statute under which this action was brought or the interpretation and application as made by the Mississippi Supreme Court and in the court below when the injunction herein was granted, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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JULY, 1953.